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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Federal Communications Commission decides most of its comparative broadcast licensing cases on but five meaningful criteria, one of which is race or ethnicity and one of which is gender.

The questions presented for review are:

1. Whether the Federal Communications Commission's policies of awarding substantial preferences in comparative broadcast licensing proceedings to minority and female applicants, created in the absence of any findings of prior discrimination and applied for the sole purpose of fostering program diversity, violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

2. Whether Congress' 1988 and 1989 appropriations legislation, which closed down the Federal Communications Commission's first comprehensive examination of the factual, statutory and constitutional bases for its minority- and gender-based preference classification policies; defunded any reexamination of, changes in, or appeal regarding the policies, and ordered the reinstatement and maintenance of the race-, ethnic- and gender-based classifications, absent historical evidence of prior discrimination and for the sole purpose of fostering program diversity, exceeded congressional authority under Section 5 of the Fourteenth Amendment and violated the equal protection principles embodied in the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

3. Whether the doctrine of *stare decisis* requires that a prior decision by a panel of a federal appellate court must be followed by subsequent, same-circuit, panels in later cases where reasoned analysis, especially in light of intervening Supreme Court pronouncements, compels the conclusion that the earlier panel was in error.

LIST OF PARTIES

The parties in *Winter Park Communications, Inc.* v. *Federal Communications Commission*, 873 F.2d 347 (D.C. Cir. 1989) (consolidated case nos. 85-1755 and 85-1756) were appellants Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park), appellee Federal Communications Commission, intervenors Rainbow Broadcasting Company (Rainbow), City of Winter Park and Winter Park Chamber of Commerce, and amicus curiae United States of America.

PARTIES' STRUCTURES

Metro and Winter Park are privately held corporations. Neither has any parent, subsidiary or affiliated corporations. Rainbow is a general partnership.

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IN THE

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No.

METRO BROADCASTING, INC.,

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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Metro Broadcasting, Inc. (Metro) petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals or lower court) to review the decision and judgment in *Winter Park Communications, Inc.* v. *Federal Communications Commission*, 873 F.2d 347 (D.C. Cir. 1989) (2-1 decision) (*Winter Park*), denying review of a decision of the Review Board of the Federal Communications Commission (Commission or FCC), which awarded a construction permit for a new UHF television station at Orlando, Florida to Rainbow Broadcasting Company (Rainbow) and denied the competing application therefor of Metro.[1]

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 873 F.2d 347 (D.C. Cir. 1989) and is reproduced in Appendix

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[1] The application of Winter Park Communications, Inc. (Winter Park) also was denied for reasons not here relevant. (App. B at 90a).

(App.) A at 1a. The Decision of the Review Board granting the application is published at 99 FCC 2d 688 (Rev. Bd. 1985) and is reproduced in Appendix B at 64a. The Commission's Order denying review of the Review Board's Decision is unpublished but is reproduced in Appendix B at 60a. The Commission's Memorandum Opinions and Orders while on remand are published at 2 FCC Rcd 1474 (1987) and 3 FCC Rcd 866 (1988) and are reproduced, respectively, in Appendix B at 52a and 48a.

JURISDICTION

The Opinion (App. A at 1a) and Judgment (App. C at 94a) of the Court of Appeals were entered on April 21, 1989, as was an order withholding issuance of the mandate pending any timely petition for rehearing and/or suggestion for rehearing *en banc*. (App. A at 47a). The order denying Metro's petition for rehearing was entered June 21, 1989 (App. C at 96a), as was the order denying Metro's suggestion for rehearing *en banc* (App. C at 98a).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution of the United States of America are the Fifth Amendment thereto and Sections 1 and 5 of the Fourteenth Amendment thereto. Their texts are set forth in Appendix D at 100a.

The germane sections of the *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087 (1982) *codified at* (47 U.S.C. §§ 309(i)(3)(A) - (4)(A)), are set forth in Appendix D at 102a.

The relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987) are reproduced in Appendix D at 100a.

The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-459, 102 Stat. 2216-17 (1988) are set forth in Appendix D at 101a.

STATEMENT OF THE CASE

Metro, petitioner, filed an application for a construction permit for a new television station on Channel 65 at Orlando, Florida, in 1982. Rainbow, respondent, filed a competing application later that year, and the two mutually exclusive applicants[2] were pitted against one another in the crucible of a comparative hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended.[3] Because Rainbow received enhancement credits for its attributable 90% Hispanic and 5% female (included within the Hispanic attribution) ownership composition, it ultimately prevailed under the Commission's minority and gender preference scheme. (App. A at 6a; App. B at 50a, 61a, 87a and 88a).

Racial and Gender Preferences in the Commission's Comparative Process[4]

In comparative licensing proceedings for new broadcast stations, the Commission is charged by statute with following the "public convenience, interest, or necessity." 47

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[2] The application of Winter Park was designated for hearing in the same proceeding, but as is reflected in note 1, supra, the issue Winter Park raised below is not germane to the proceedings before this Court. Also designated for hearing in the same proceeding was the application of Orlando Family Television, Ltd., which voluntarily was dismissed by the applicant while still before the Administrative Law Judge.

[3] 47 U.S.C. § 309(e) (1982).

[4] Certain sections of the Statement of the Case are taken from the Brief for the United States as Amicus Curiae in the court below, and the Brief for the Federal Communications Commission on Hearing *En Banc* in *Steele* v. *FCC*, No. 84-1176 (D.C. Cir.) (September 12, 1986).

U.S.C. § 307(a). *See also* 47 U.S.C. § 309(a). Pursuant to this mandate, the Commission has adopted certain standard criteria which are considered in every comparative proceeding. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (the *1965 Policy Statement*). The Commission explained in its *1965 Policy Statement* that the two main goals governing its selection among qualified applicants were: (1) to achieve the best practicable service to the public; and (2) to effect maximum diffusion of control of the media of mass communications, generally referred to as diversification. Id. at 394.

As originally set forth in the *1965 Policy Statement*, the selection criteria for comparative analysis were race-neutral. *Chapman Radio and Television Co.*, 19 FCC 2d 157, 183 (1969), *reconsideration denied*, 20 FCC 2d 624 (Rev. Bd. 1969); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 17-18 (Rev. Bd.), *review denied*, 37 FCC 2d 559 (1972), *rev'd, TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir 1973), *cert. denied*, 419 U.S. 986 (1974) (*TV 9*). Only an applicant's "experience, background, and knowledge of the community" were deemed appropriate qualitative factors to consider under the "best practical service" criterion. 495 F.2d at 936.[5] However, in *TV 9*, the District of Columbia Circuit rejected the Commission's argument that the "the 'Communications Act, like the Constitution, is color blind,'" holding instead that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded" in the comparison. *Id.* at 938. Subsequently, in *Garrett* v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975), the same Circuit refused to accept the Commission's view that a racial preference should be

[5] In the *TV 9* proceeding the Review Board had held, and the Commission affirmed, that "[b]lack ownership cannot and should not be an independent comparative factor * * *; rather, such ownership must be shown on the record to result in some public interest benefit." 33 FCC 2d at 18.

awarded only where an applicant demonstrates a nexus between race and increased program diversity, declaring that race presumptively would promote such diversity when minority owners are integrated into the management of the proposed station.[6]

Based on these directives, the Commission concluded that minority ownership and participation should receive credit in the comparative process and decided that a preference would be awarded to minority applicants under the "best practicable service" criterion in Commission hearings. *WPIX, Inc.*, 68 FCC 2d 381 (1978). Subsequently, the Commission developed two other policies designed to promote minority ownership of broadcast facilities through preferences.[7] They are the *distress sale policy*, which allows a broadcaster whose license is in jeopardy due to a renewal or revocation proceeding to sell the station at up to 75% of market value to a minority-owned, or minority-controlled purchaser, and a policy of affording *tax certificates* to sellers of media properties where the purchaser is minority-owned or minority-controlled. The distress sale policy has fallen as unconstitutional.[8]

The FCC's Review Board first extended the minority preference to female applicants in *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on*

[6] *Id.* at 1063.

[7] *Statement of Mark S. Fowler, Chairman, Federal Communications Commission, Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce* (Oct. 2, 1986).

[8] Only three weeks before a panel of the Court of Appeals for the District of Columbia Circuit decided this case, a different panel of the same court, in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 901 (D.C. Cir. 1989)(2-1 decision), struck down the Commission's distress sale policy. Rehearing *en banc* was denied in that case, as in *Winter Park*. It is expected that the Commission will petition for certiorari in *Shurberg*.

other grounds, 87 FCC 2d 203 (1981). The Commission later acquiesced in the Board's decision.[9] The gender preference was challenged in *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985), where a panel held that "the Commission exceeded its authority under the Federal Communications Act by adopting a female preference in comparative broadcast proceedings." *Id.* at 1199. However, the circuit, sitting *en banc*, vacated the panel decision, granted rehearing and called for rebriefing.[10]

The Commission's Reexamination of its Preferences in *Steele*

In *Steele, en banc*, the Commission concluded that both its gender and minority preference policies were indefensible on the record as it stood. Before the *en banc Steele* court, the Commission submitted a motion for remand with its brief on the merits, and concurrently released a Public Notice, FCC 86-387 (Sept. 15, 1986) (App. E at 106a), announcing its actions. In its brief, the Commission admitted that it "had neither constitutional authority nor statutory basis for the female preference," and asked that the court remand the matter for further consideration. The Commission proclaimed in its motion for remand that "race, sex or national origin *per se* should not be a basis for licensing determinations," and expressed its disbelief in the proposition that "a sufficient foundation [existed] to satisfy statutory review requirements or the heightened scrutiny the Constitution requires of racial or gender based preferences." Through its Public Notice, the Commission announced that it would be "looking at this issue and instituting a proceeding to collect evidence if allowable in light of the court's *en banc* action in *Steele*," *Public Notice*

[9] *E.g., Horne Industries, Inc.*, 94 FCC 2d 815 (Rev. Bd. 1983), *modified*, 98 FCC 2d 601, 602-03 (1984).

[10] As explained *infra* at n.18, Steele never reached an *en banc* Circuit decision.

(App. E at 107a.), and reiterated its opinion that "racial and gender preferences are constitutionally suspect and before they can be imposed the agency must have an 'exceedingly persuasive justification' " (citing *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)) (App. E at 107a).

As recounted in *Metro Broadcasting, Inc.*, 3 FCC Rcd 866 (1988) (App. B at 48a), the court remanded *Steele* to the Commission "in order to permit the agency to reexamine the bases for its minority and female preference policies." The record in this case was remanded for the same purpose, *id.*, as was the record in *Shurberg*. 876 F.2d at 927 (MacKinnon, J., concurring in judgment). In due course, the Commission, by *Notice of Inquiry*, opened MM Docket No. 86-484, encaptioned *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), *modified*, 2 FCC Rcd 2377 (1987) (*Racial, Ethnic or Gender Classifications* or *Inquiry*).[11] Evidence was collected from numerous interested parties, but the *Inquiry* was doomed on December 22, 1987, when the President signed *House Joint Resolution 395* into law. *Racial, Ethnic or Gender Classifications*, 3 FCC Rcd 766 (1988); *Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-102, 101 Stat. 1329 (1987) (*1988 Appropriations Act*) (App. D at 100a).

The *1988 Appropriations Act*, which contained the funding legislation for the Commission for fiscal year 1988, directed the FCC, *inter alia*, "to close MM Docket No. 86-484 with a reinstatement of prior policy . . ." with re-

[11] Pending completion of the *Inquiry*, the Commission ordered that action be deferred in all cases in which the award of racial, ethnic or gender preferences would be dispositive of the outcome. 1 FCC Rcd at 1319. The instant case was among those held in abeyance. *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987) (App. B at 52a).

spect to "minority and women ownership of broadcasting licenses . . . ." *1988 Appropriations Act* (App. D at 100a). Similar language was incorporated into the appropriations legislation for fiscal year 1989. *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Pub. L. No. 100-459, 102 Stat. 2216 (December, 1988) (*1989 Appropriations Act*). (App. D at 101a). Following the enactment of the *1988 Appropriations Act*, the Commission ceased the *Inquiry*, decided those cases held in abeyance pursuant to its order therein, and began to reapply its minority and female preferences in comparative proceedings. *E.g., Faith Center, Inc.*, 3 FCC Rcd 868 (1988); *Metro Broadcasting, Inc.* 3 FCC Rcd 866 (1988) (App. B at 48a).

The Mechanics of Integration and the Application of the Commission's Preferences in the Instant Proceeding

Diversification of ownership of the mass media, the second of the Commission's standard comparative criteria, is of such overwhelming importance, *e.g., FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 697 (1978), that it is seldom, if ever, a factor in comparative rankings. Under the diversification criterion, ownership interests in other mass communications media push an applicant below its starting point in the comparative evaluation. *WPIX, Inc.*, 68 FCC 2d at 385. As the Commission's Review Board said, "an applicant having no other attributable mass media interests will all but certainly prevail over a party with such interests." *Newton Television, Limited*, 3 FCC Rcd 553 (Rev. Bd. 1988), *modified* 4 FCC Rcd 2561 (1989) (citing eight prior cases). Accordingly, the Commission's licensing decisions almost invariably turn on the second factor, "best practicable service," under which the predominant consideration is the quantitative degree to which new station owners are proposed to be integrated into management (most applicants seek 100% credit or close to it), incorporating consideration of certain qualitative enhancements that elevate the applicant for comparative purposes. *WPIX, Inc.*, 68 FCC 2d 381.

Not surprisingly, this case was decided on the "best practicable service" criterion. The Review Board awarded Metro a "79.2% full-time plus 19.8% part-time quantitative integration credit" and Rainbow a "90% full-time credit." 99 FCC 2d at 703 (App. B at 86a). Quantitative credit is calculated by determining the voting ownership interest of each integrated principal and totaling them as to each category, *i.e.*, full-time, substantial, and part-time. Rainbow's quantitative advantage was not sufficient to be decisional. In circumstances where that is the case, the Commission turns, as it did here, to "qualitative attributes."[12]

Qualitative attributes, or enhancement factors, are the heart of this case. They are scant in number[13] thus each, where present, takes on enormous importance. The enhancement factors are: (1) minority status; (2) female status; (3) local residence; (4) civic activity within the service area, and (5) past broadcast experience. The two most important factors are local residence and minority status. Indeed, they are co-equal.[14] Female status is entitled to somewhat less weight than minority status,[15] but the exact weight accorded female status is uncertain. Civic participation is considered as part of a proposed owner's local residence background, and thus is close on the heels of the foregoing in terms of importance.[16] Past broadcast ex-

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[12] *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd.), *reconsideration denied*, 89 FCC 2d 631 (1982).

[13] *Racial, Ethnic or Gender Classifications*, 1 FCC Rcd at 1315.

[14] *E.g., Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-946 (1985); *Linda Crook*, 3 FCC Rcd 354 (1988).

[15] *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981).

[16] *1965 Policy Statement*, 1 FCC 2d at 396.

perience is a distant last and seldom serves any function other than that of a tie breaker.[17]

The Commission's application of minority and female preferences in the instant case was dispositive. Metro prevailed on the local residence and civic participation qualitative attributes. However, the Review Board concluded that "although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage (5% vs. Metro's 0%) and solid broadcast experience preference, somewhat outweighs Metro's local residence and civic participation advantage." 99 FCC 2d at 704 (App. B at 88a). On remand, discussed *supra* at 6-7, the Commission acknowledged that, "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." *Metro Broadcasting, Inc.*, 2 FCC Rcd at 1475 (App. B at 56a).

Prior to its appeal to the District of Columbia Circuit under 47 U.S.C. § 402(a) (1982), and before the *Winter Park* and *Steele* remands, Metro petitioned the full Commission for review. The Commission's denial of Metro's entreaty (App. B at 62a) transformed the decision of the Review Board into that of the Commission, pursuant to Section 155 of the Communications Act of 1934. 47 U.S.C. § 155(c)(3). With *Racial, Ethnic or Gender Classifications* closed down by the congressional appropriations legislation, *Winter Park*, on Metro's motion, was recalled by the Court of Appeals, rebriefed, argued and decided.[18]

Between oral argument and decision, this Court decided *City of Richmond* v. *J. A. Croson Co.*, 109 S.Ct. 706 (1989) (*Croson*), which should have influenced the lower court's ruling. Recognizing this, Metro timely lodged a Supple-

[17] *Id.*

[18] *Steele* was not decided post-remand, nor will it ever be, as the case has been settled. *James U. Steele*, 4 FCC Rcd 4700 (1989).

mental Brief with the court. However, Metro's motion for leave to file its Supplemental Brief was denied and the brief rejected. (App. E at 104a).

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Ruling That The Federal Communications Commission's Race-, Ethnic- And Gender-Based Preference Classifications Are Constitutional Involves Important Issues Of Constitutional Law That Ought To Be Resolved By This Court.

This case presents the Court with several issues of first impression regarding the constitutionality of government sponsored race-, ethnic- and gender-based classifications in the context of the minority and female preferences routinely applied by the FCC in its comparative hearing process. This Court has addressed the constitutionality of governmental race-based preference classifications thrice before,[19] and those cases portend the ultimate arrival of the issues raised herein. *Fullilove* examined racial classifications imposed by *Congress*, discussing the standard of equal protection review applicable to congressional race-based remedial measures enforced against the States and the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472-92 (Burger, C.J., writing for the plurality). *Wygant*, and the more recent *Croson*, shed light on the disposition of cases in which race-based remedies are imposed by a *state* or *local* government without evidence of identified past discrimination, and enunciate criteria for properly tailoring race-based remedies where evidence of such identified discrimination is present. *Webster* v. *Reproductive Health Services*, 109

[19] *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986); and *City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706 (1989) (*Croson*).

S.Ct 3040, 3064 (1989) (Scalia, J., concurring in part). However, the Commission's preference classifications, which (1) arose as a federal agency's response to judicial directives; (2) are administered and applied by the agency, rather than Congress or state or local government; (3) were created in the absence of any evidence of past discrimination or nexus between remedy and objective, and (4) have been entrenched by subsequent congressional legislation despite the agency's attempts to reexamine or repeal them, fit snugly in the gaps left by this Court's prior decisions and evade clear resolution under current equal protection review standards. This Court's evaluation of the Commission's preference scheme could resolve many unsettled issues in the complex area of equal protection review and reach, for the first time, elements therein relating to federal agencies.

The Decision Below

The lower court's determination that the FCC's racial, ethnic and gender[20] preferences withstand constitutional scrutiny was based almost entirely upon the same court's previous ruling in *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601, 604-07 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Judge Edwards, writing for the majority, stated in *Winter Park*'s opening paragraph that, "this case is clearly controlled by *West Michigan* . . .," 873 F.2d at 349 (App. A at 2a), and concluded that "our prior decision in West Michigan controls the disposition of the case with respect to the FCC's use of a qualitative enhancement for minority ownership." 873 F.2d at 356 (App. A at 17a). The lower court's majority opinion merely tracks the reasoning first advanced in *West Michigan*, noting that governance of the cases on which *West Michigan* relied—*Fullilove* and *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978)—remains intact, despite more recent

[20] The lower court defaulted on gender. See note 22, *infra*.

Supreme Court decisions. 873 F.2d at 353-55 (App. A at 10a-15a).

The *West Michigan* Rationale

When the Court of Appeals decided *West Michigan*, two of this Court's precedents were deemed critical to the constitutionality of the Commission's award of minority-based preferences: *Fullilove* and *Bakke*. *West Michigan*, 735 F.2d at 613; *Winter Park*, 873 F.2d at 354 (App. A at 12a). Yet the *West Michigan* court declined to undertake "a detailed or lengthy inquiry into the exact contours of the approaches taken in . . . those cases." 735 F.2d at 613. Instead, Judge J. Skelly Wright, announcing the opinion of the court, casually declared that "a *number* of factors show that the FCC's plan easily passes constitutional muster in light of the various *Bakke* and *Fullilove* approaches." *Id.* (emphasis added).

In fact, *West Michigan* specified only two factors in support of its conviction that the FCC's minority preference policy was constitutionally firm: (a) that consideration of minority status was but "one factor in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters," 735 F.2d at 613, and (b) that Congress, in passing legislation directing the Commission to incorporate preferences for minority applicants into any random selection licensing scheme adopted to replace the comparative hearing process,[21] recognized the "extreme underrepresentation of minorities and their perspectives in the broadcast mass media." 735 F.2d at 613-14.

The court determined that the first factor validated the minority preference classifications under Justice Powell's

[21] *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087 (1982) (*codified* at 47 U.S.C. §§ 309(i)(3)(A)-(4)(A)), reproduced in Appendix D at 102a.

approach in *Bakke*, drawing an analogy between Justice Powell's approval, in principle, of the use of race as a factor in the educational admissions process for the purpose of obtaining diverse student bodies, and the FCC's use of a minority preference to further its goal of attaining diverse broadcast programming, on the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *West Michigan*, 735 F.2d at 614 (quoting *1965 Policy Statement*, 1 FCC 2d at 394 n. 4). The second factor, presence of congressional action, was found dispositive under Fullilove, as the court stated "[a]ny doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *Id.* at 615. Judge Wright concluded that

> Under *Fullilove*, Congress can clearly adopt such race-conscious policies to assure that current allocations do not perpetuate race-based disparities derived from past discrimination. And an administrative agency can certainly follow Congress' lead in an effort to further implement Congress' concerns.

Id. at 616.

West Michigan's dual rationale for affirming the constitutionality of the Commission's preference classifications was adopted by the majority in *Winter Park*, 873 F.2d at 356 (App. A at 17a and 18a), notwithstanding that any remedial purpose was vehemently disclaimed by the Commission. 873 F.2d at 356 n.1 (App. A at 18a) (Williams, J. dissenting). Yet, the *West Michigan* decision, if ever sound, would appear to have been undermined by subsequent pronouncements in *Wygant*, 476 U.S. 267, and *Croson*, 109 S.Ct. 706. Moreover, neither *West Michigan* nor *Winter Park* reviewed the constitutionality of the Commission's gender-based preference policy, which must be

addressed in this case.[22] A ruling from this Court is needed to break the lock fastened by *stare decisis* in the D.C. Circuit, and to determine whether the Commission's preference policies have a valid constitutional basis.

Program Diversity as a Compelling Governmental Interest

The *West Michigan* and *Winter Park* courts' references to the Commission's diversity rationale in support of the constitutionality of its minority-based preferences raise hitherto dormant issues regarding the application and expansion of reasoning first advanced by Justice Powell in *Bakke*, 438 U.S. 265, and again by Justice O'Conner in *Wygant*, 476 U.S. 267. Additionally, neither the *West Michigan* nor the *Winter Park* opinion discusses whether the Commission's preference policies are narrowly tailored to achieve its objectives. Accordingly, review by this Court is needed to determine: (a) whether the "diversity" rationale, first advanced in *Bakke*, has valid application with respect to the Commission's race-, ethnic- and gender-based classifications; (b) whether program diversity, as employed by the FCC, is a compelling governmental interest under

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[22] The *Winter Park* majority noted, in footnote 5 to its opinion, 873 F.2d at 353, n.5 (App. A at 10a), that "the Commission determined below that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation. *See* 3 FCC Rcd at 867 n.1. Accordingly, we consider only the legality of the FCC's use of a qualitative enhancement for minority ownership."That language came on remand. not upon the Commission's denial of review, which said the same thing. Pursuant to 47 C.F.R. Section 115(g) the Commission could have granted in part and denied in part Metro's Application for Review. It chose to deny, thereby invoking Section 155(c)(3) of the Communications Act, notwithstanding note 5 to the *Winter Park* majority opinion. The Commission's text accompanying denial of review, (App. B at 60a), including its remark that Rainbow's female preference was not decisional, is but dicta. Moreover, whether *failure* to consider gender would not have altered the result is irrelevant. What is relevant is what happened and the legal consequences thereof.

the prevailing strict scrutiny standard of review, independent of any attempt to remedy past discrimination, and (c) if so, whether the Commission's preference classifications are narrowly tailored to achieve that interest.

Metro, along with The United States, as *amicus*, urged the court below to hold that governmental classifications by race and gender are subject to strict scrutiny and that the Commission's policy is not narrowly tailored.[23] The *Winter Park* majority, as Judge Wright in *West Michigan*, did neither—avoiding the subjects altogether. The majority of this Court apparently now believes that racial classifications, whether purportedly "remedial," or "benign," must be subjected to strict scrutiny review when faced with an equal protection attack.[24] To survive such analysis, (1) a racial or gender classification must be justified by a "compelling governmental interest," and (2) the means chosen by the governmental unit to effectuate its purpose must be "narrowly tailored." *Wygant*, 476 U.S. at 274, 285; *Croson*, 109 S.Ct at 721-22 (quoting *Weinberger* v. *Wiesenfield*, 420 U.S. 636, 648 (1975).

Metro questions whether the promotion of program diversity is a compelling governmental interest. This Court clearly has held that the federal government has a compelling interest in remedying past racial discrimination and/or its lingering effects. *Wygant*, 476 U.S at 286. "In *Ful-*

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[23] Brief for the United States as Amicus Curiae at 11-13 and 28-32; Metro Brief at 24 and at Oral Argument.

[24] *See Wygant*, 476 U.S. at 273-74 (Powell, J., joined by Burger, C.J., Rehnquist, J. and O'Connor, J.); *id.* at 285 (O'Conner, J., concurring in part and concurring in the judgment); *Croson*, 109 S.Ct at 721 (Part III-A, O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.); *id.* at 735 (Scalia, J. concurring); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *see also Croson*, at 752 (Marshall, J., dissenting, joined by Brennan, J., and Blackmun, J.) (noting this as a novel aspect of the decision).

lilove, six members of this Court deemed this interest sufficient to support a race-conscious set-aside program governing federal contract procurement." *Croson*, 109 S. Ct. at (Marshall, J., dissenting). Additionally, although its application remains untested, this Court has held that a state interest in the promotion of racial diversity was sufficiently compelling to support the use of racial considerations in furthering that interest, at least in the context of higher education. *Bakke*, 438 U.S. at 311-15; *Wygant*, 476 U.S. at 286. And, Justice O'Connor suggested in *Wygant*, that additional interests might be considered by this Court:

> [N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

Id.

Both *West Michigan* and *Winter Park* treated the FCC's diversity goal as analogous or identical to the objective embraced by Justice Powell in *Bakke*. *West Michigan*, 735 F.2d at 615; *Winter Park*, 873 F.2d at 354 (App. A at 13a). Metro, however, posits that the "diversity" interest advanced by the Commission in its comparative hearing context is much different from the "diversity" interest hypothetically approved in *Bakke*, and should be reviewed by this Court before receiving routine application in lower courts as an interest justifying race-, ethnic- and gender-based classifications.

The Commission has characterized its race-, ethnic- and gender-based preference policies as an attempt to "enhance *program diversity* by increasing ownership of stations by significant groups that are substantially underrepresented in station ownership." *FCC Brief in*

Winter Park at 47 n. 47 (quoted in *Winter Park*, 873 F.2d at 357 (Williams, J., dissenting)) (App. A at 19a) (emphasis added). However, programming diversity appears to be amorphous, undefined even by its proponent. Only the origins of the concept provide a clue as to its meaning. Apparently, the rationale is an extension of the idea, first presented by the D.C. Circuit in *TV 9, Inc.* v. *FCC*, 495 F.2d at 938, and *Garrett* v. *FCC*, 513 F.2d at 1063, that diversity of station ownership will bring about diversity of programming. *See Winter Park*, 873 F.2d at 363 (Williams, J., dissenting) (App. A at 32a, 33a). In plain English, "program diversity" means different kinds and types of programming.

"Program diversity" and the "academic diversity" outlined by Justice Powell in *Bakke* would not appear to serve as interchangeable justifications for government imposed racial, ethnic and/or gender classifications. The different contexts from which the two goals arise would seem to render meaningful comparison impossible. For example, Justice Powell found that academic diversity was tied to the notion of academic freedom. *Bakke*, 438 U.S. at 313. A university's First Amendment freedom to select and create its own diverse student body was deemed important for exposing students to the "atmosphere of 'speculation, experiment and creation' " deemed "essential to the quality of higher education." *Id.* at 323. This unique academic goal would not seem to have a counterpart in the Commission's race-, ethnic- and gender-based preference policies. Judge Silberman, writing for a different panel of the D.C. Circuit in *Shurberg*, found the analogy between the two goals "wanting":

> It is simply unacceptable, in my view, to say that the government has a role in educating the general public through television broadcasts that is parallel to its interest in promoting diversity in the educational setting. That is a somewhat Orwellian notion. Through public education, the government has assumed a special function in preparing our youth for participation in society. . . . But there is no indication that Justice Powell contemplated that his reasoning would extend beyond the distinctive context of education where the state legitimately engages in a form of indoctrination.

876 F.2d at 920 n. 27.

Another distinction between Justice Powell's academic diversity rationale and the Commission's program diversity goal is that the pursuit of academic diversity in the manner advocated by Justice Powell tends to break down racial stereotypes, whereas the Commission's indirect pursuit of program diversity through the promotion of minority and female ownership perpetuates them. As Judge Williams stated in his *Winter Park* dissent, "[e]thnic diversity in the classroom enables those present to see individual members of ethnic groups as they are. Far from depending on some link between race and conduct, it is a potent device *against* ethnic stereotyping." 873 F.2d at 357 (App. A at 21a). Conversely, the Commission's ownership promotion policies are based on the "reasonable expectation"[25] that minority owners will program in some sort of minority manner. Under the Commission's theory, race, ethnicity and gender not only determine what type of programming station owners want to provide, but also what viewers and listeners want to hear. *See Id.* at 358 (App. A at 21a). This appears to be exactly the type of racial stereotyping that the *Croson* majority identified as a preeminent danger in the use of racial classifications. *See Croson*, 109 S.Ct at 721; *id.* at 730-34 (Stevens, J., concurring); *id.* at 735, 739 (Scalia, J., concurring).

Numerous contrasts render acceptance of the Commission's preference classifications under the *Bakke* diversity

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[25] *TV 9, Inc.*, 495 F.2d at 938 ("Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors").

rationale problematic, if not impossible. Accordingly, this Court's ruling is necessary to determine the extent to which Justice Powell's rationale may be expanded to encompass the use of "diversity" as a compelling governmental interest outside the academic admissions context.

Notwithstanding the applicability or nonapplicability of the *Bakke* diversity rationale to the instant case, however, programming diversity, by itself, would not appear to be a compelling government interest because the government neither can ensure nor enhance it: the marketplace does that. And, the marketplace apparently is working. The Commission itself concluded in *Deregulation of Radio*,[26] that "all types of minority needs, be they racial, ethnic or taste, can be and indeed are being well met through increasing the number of stations." *Id.* at 1068. As the Commission explained:

> [L]icensees have come to the conclusion that, even where the group appealed to has traditionally . . . had a low income or is low in number, marketplace forces make the provision of radio service to these segments of the community a rational economic decision.

Id.

Similar conclusions were reached in *Commercial TV Stations*, 98 FCC 2d 1076 (1984), *reconsideration denied*, 104 FCC 2d 357 (1986), *aff'd*, *Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987). Accordingly, even were program diversity a valid governmental interest, it could not be "compelling" because according to the governmental entity advancing the interest, it already has been, and is being, achieved.

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[26] 84 FCC 2d 968, *reconsideration denied*, 87 FCC 2d 797 (1981), *aff'd in part and rev'd in part*, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F. 2d 1413 (D.C. Cir. 1983).

Narrow Tailoring and the FCC's Minority and Gender Ownership Promotion Policies

Assuming, *arguendo*, that the Commission's goal of program diversity constitutes a compelling government interest, strict scrutiny review requires that the means chosen to effectuate this goal be "narrowly tailored" to its accomplishment. *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480. This "narrow tailoring" aspect of strict scrutiny review was not applied to the Commission's preference classifications by either the *West Michigan* court, or the majority in *Winter Park*, and never will be, due to the continuing grip of *West Michigan*, absent the intervention of this Court.

Application of the narrow tailoring prong of heightened or strict scrutiny review to the Commission's preferences fails to yield the conclusion that the Commission's minority and female ownership promotion policies are even reasonably, much less narrowly, tailored to fulfill its program diversity goal.[27] First, the Commission itself has declared that program diversity already exists or is assured by the marketplace. Thus, an indirect attempt to promote such diversity by awarding ownership preferences would appear unnecessary for, or unrelated to, the accomplishment of, program diversity. Second, the Commission's own concession that there is no record to demonstrate that the use of "a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving

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[27] Accordingly, it is doubtful whether the Commission's preference policies could withstand review under the standard advocated by Justice Marshall in *Wygant*, that use of race as a classification is permissible if it (1) serves important government objectives, and (2) is substantially related to achievement of those objectives. 476 U.S. at 302 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting). The Commission's ownership promotion policies do not appear to be substantially related to the achievement of program diversity.

that objective," *FCC Steele Brief*, at 19,[28] renders inconceivable the notion that the Commission's policies are narrowly tailored; indeed, they would appear to have no rational basis. Third, as Judge Williams points out in his *Winter Park* dissent, "[n]o party here has offered a definition of minority programming that is empirically verifiable . . . ." 873 F.2d at 358 (App. A at 22a). Ergo, the lack of a clear definition of program diversity hampers any conclusion that racial, ethnic or gender ownership composition promotes it. Fourth, the Commission has admitted it has no evidence "on which to base an assumption that a nexus exists between an owner's race or gender and program diversity." *FCC Steele Brief*, at 19. This admission would appear to destroy any claim of narrow tailoring; the Commission is uncertain even of the logic underlying its preference awards. Fifth, even if the Commission's policies promote program diversity despite its own apparent evidence to the contrary, the Commission does not appear to have considered race-neutral alternatives that can avoid the stereotyping resulting from its "reasonable expectation" that certain owners inherently broadcast specific types of programs. Finally, to the extent that the Commission's policies are designed to correct the "underrepresentation" of certain viewpoints by awarding preferences to specific groups until true program diversity is achieved, they would seem either to be unlimited in duration, or to constitute a quota. *See Winter Park*, 873 F.2d at 360 (Williams, J., dissenting) (App. A at 26a).

In sum, review by this Court is needed because evidence of narrow tailoring with respect to the Commission's minority and gender preferences is sadly lacking, and the lower courts have refused to conduct this portion of strict scrutiny analysis.

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[28] Notably, the brief was adopted by the commissioners themselves (App. E at 106a) rather than consisting of the usual *post hoc* rationalizations of government counsel.

The Presence of Congressional Action and the *Fullilove* Standard

Apparently, the reason that neither the *West Michigan* nor *Winter Park* panels undertook a complete, strict scrutiny equal protection review of the Commission's minority and female preference policies was their determination, based upon this Court's holding in *Fullilove*, that "any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goal and means." *West Michigan*, 735 F.2d at 615; *Winter Park*, 873 F.2d at 355 (App. A at 15a). For the *West Michigan* court, this "approval" was expressed by Congress' passage of § 115 of the *Communications Amendments Act of 1982*,[29] designed to facilitate the development of a random lottery system as an alternative to the Commission's comparative process. The legislation required that preferences for minority applicants be incorporated into any random selection licensing scheme adopted by the Commission. *Id.* The *Winter Park* majority found additional legislative acquiescence in the *1988* and *1989 Appropriations Acts*.[30] Both courts implied that the mere presence of the enactments provided ample grounds for treating the Commission's preferences as if they had been imposed by Congress directly, and upholding them as a valid exercise of the remedial powers accorded Congress under § 5 of the Fourteenth Amendment, pursuant to this Court's rationale in *Fullilove*. *West Michigan*, 735 F.2d at 613-16; *Winter Park*, 873 F.2d at 354 (App. A at 14a-15a).

This Court's recent decision in *Croson* raises serious questions as to whether the *Fullilove* rationale is applicable

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[29] Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (*codified* at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A)) (App. D at 102a).

[30] The court observed that "Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership. . . ." *Winter Park*, 873 F.2d at 355 (App. A at 14a).

to the FCC's preference classifications. *Croson*, for the first time, makes clear that *Fullilove*'s review standard may be employed only in connection with race-based remedial measures undertaken by *Congress*, pursuant to its unique constitutional responsibility to enforce the Equal Protection Clause against the states. *Croson*, 106 S.Ct at 718, 719, 726. Application of that standard in the instant case is problematic. First, the Commission has eschewed the notion that its preference policies have any remedial basis,[31] and both the congressional lottery legislation and appropriations acts appear to be based upon the promotion of program diversity rather than the imposition of a remedial rationale upon the agency.[32] Second, the presence of congressional action sufficient to invoke the more deferential *Fullilove* standard of review is dubious. The Commission's preferences, which developed as an agency response to *judicial* directives, had been in effect for *ten years* before Congress enacted the *1988* and *1989 Appropriations Acts*, and the 1982 legislation relied upon in *West Michigan* did not even pertain to the Commission's comparative hearings.[33] Finally, the specific justification presented in *Fullilove* for application of a more deferential review standard—Congress' authority, under § 5 of the Fourteenth Amendment to curtail or correct *state* discrimination based on race, *Croson* 109 S.Ct at 719-20,—is wholly absent here, where the policies at issue were formulated and applied by a *federal agency* and no evidence of past discrimination by the agency has been proffered.

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[31] *Winter Park*, 873 F.2d at 353 n.6 (majority opinion) (App. A at 11a); *id.* at 356, 362, 363 (Williams, J., concurring in part and dissenting in part) (App. A at 18a, 31a, 33a).

[32] *See* discussion in *Winter Park*, 873 F.2d at 363-65 (Williams, J. concurring in part and dissenting in part) (App. A at 34a-38a).

[33] Metro notes that only the lottery legislation had been enacted when it first applied for the proposed Orlando station in 1982, and questions whether congressional enactments following that date may be lawfully construed herein.

If, notwithstanding the above, *Fullilove* is deemed applicable here, issues remain which have yet to be addressed by the Court, the most important of which are (a) whether the objective of promoting program diversity provides sufficient constitutional basis for congressional race-, ethnic- and/or gender-based legislative measures, absent evidence of identified discrimination; (b) what level of congressional participation is required before a court must invoke the *Fullilove* review standard; (c) whether, and to what extent Congress' § 5, Fourteenth Amendment power may be expanded and used to constrain agency action, as well as action by the states, and (d) whether the entrenchment of the FCC's minority and female preference policies constitutes a narrowly tailored, constitutional means for achieving Congress' diversity objectives. Clarification is needed to allay the confusion which remains following the *Croson* decision and to apply, for the first time, some of the reasoning initially suggested therein.

2. The Lower Court's Determination That The Federal Communications Commission's Race-, Ethnic- And Gender-Based Preference Classifications Are Constitutional Is Inconsistent With The Rationale And Result Reached By A Different Panel Of The Same Circuit Three Weeks Earlier And Involves An Important Issue Of Judicial Policy With Respect To Intracircuit *Stare Decisis* Which Ought To Be Resolved By This Court.

Croson acknowledged confusion in the lower courts regarding the appropriate standard for equal protection review. Opening in *Croson*, Justice O'Connor noted that some federal courts had applied the *Fullilove* standard in assessing the constitutionality of state and local minority set-aside programs, whereas others employed *Wygant*'s strict scrutiny approach. *Croson*, 106 S. Ct. at 712. Unfortunately, whereas *Croson* clarified both the *Fullilove* and strict scrutiny standards by enumerating certain circumstances in which the use of each is appropriate, confusion

still reigns, particularly with respect to applications not discussed by this Court due to the *Fullilove, Wygant* and *Croson* factual scenarios.

This confusion has been felt in the D.C. Circuit, as two separate panels, in *Winter Park*, and *Shurberg*, have grappled with the application of this Court's precedents to the FCC's preference policies, each reaching opposite conclusions. Judge Silberman's comments on behalf of the *Shurberg* majority are illustrative:

> [I]in [the] aftermath [of *Bakke, Fullilove, Wygant*, and *Croson*] I would be less than candid not to concede that discerning and applying constitutional principles in this area is difficult; in none of the first three cases does a majority of the Court join any one opinion. Under these circumstances, a lower federal court must do its level best to extract the holding that commanded a majority in each case to arrive at the governing principles and limitations.

876 F. 2d at 910.

Similar frustrations were expressed by Judge Williams in *Winter Park*, 873 F.2d at 366 (App. A at 41a), and Judge MacKinnon in *Shurberg*. 876 F.2d at 928.

Between *Shurberg* and *Winter Park*, five opinions sprung forth—three finding constitutional fault and two finding constitutional validity. Four displayed valiant efforts to come to grips with the novel constitutional issues presented in the two cases, notwithstanding the holding in *West Michigan*. One, however, the majority opinion in *Winter Park*, dodged the constitutional issue, claiming fealty to *West Michigan* notwithstanding the intervening *Wygant*, 476 U.S. 267, and *Croson*, 109 S. Ct. 706.

Former Commission Chairman Patrick exclaimed his bafflement at the inconsistency between *Shurberg* and *Winter*

Park, particularly in light of *Wygant* and *Croson*. *Commission Files Petition for Rehearing* en banc *in* Shurberg *v.* FCC, 4 FCC Rcd 4511-12 (1989) (Dissenting Statement of Chairman Dennis R. Patrick) (App. E at 111a). He was of the opinion that *Shurberg* and *Winter Park* should have been considered together so that "the court could give us definitive guidance." *Id.* at 4512 (App. E at 112a).

It is evident from the strong criticism of *West Michigan* by Judges Silberman, MacKinnon and Williams in the two conflicting decisions that a reasoned analysis of *West Michigan* would have led to the conclusion that it was decided erroneously, especially in light of subsequent decisions of this Court undermining it. *West Michigan* should not have been followed blindly in the name of intracircuit *stare decisis*. This Court should so proclaim, thereby freeing subsequent panels in all circuits to meet their obligation to decide cases as they view the law, leaving reconciliation or interment to the particular circuit *en banc*.

CONCLUSION

The Commission has been delegated responsibility for determining the public interest in the field of electronic communications. It developed criteria based upon this mandate and implemented them in a race-neutral manner. The D.C. Circuit concocted the racial preference. The FCC dutifully submitted until this Court's decisions required that it exercise its own judgment. Congress stepped in, notwithstanding its earlier delegation, and, through the Appropriations Acts, emasculated the Commmission's efforts. Judge Silberman, in *Shurberg*, noted "not only has Congress prevented the FCC from attempting to muster factual support for a position that it conceded was impermissible on the present record, but it has placed the FCC in a situation where it was obligated to disregard an

order of this Court." 876 F.2d at 925 n.39. Chairman Patrick has felt the full brunt of this whipsaw and has cried out for relief from the void created. *Dissenting Statement*, 4 FCC Rcd at 4511 (App. E at 110-111a).

For the foregoing reasons, the requested writ of certiorari should issue.

Respectfully submitted,

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September, 1989

APPENDICES

APPENDIX A

[873 F.2d 347]

WINTER PARK COMMUNICATIONS, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

Rainbow Broadcasting Company, Metro Broadcasting, Inc., Winter Park Chamber of Commerce and City of Winter Park,
Intervenors.

METRO BROADCASTING, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

Rainbow Broadcasting Company and Winter Park Communications, Inc.,
Intervenors.

Nos. 85-1755, 88-[sic]1756.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 21, 1988.
Decided April 21, 1989.

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[873 F.2d 349]

Before EDWARDS and WILLIAMS, Circuit Judges, and

FRIEDMAN,* Circuit Judge, United States Court of Appeals for the Federal Circuit.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

Opinion concurring in part and dissenting in part filed by Circuit Judge STEPHEN F. WILLIAMS.

HARRY T. EDWARDS, Circuit Judge:

In these consolidated cases, Metro Broadcasting, Inc. ("Metro") and Winter Park Communications, Inc. ("Winter") seek review of an order of the Federal Communications Commission ("FCC" or "Commission") awarding Rainbow Broadcasting Company ("Rainbow") a license to operate a UHF television station in Orlando, Florida. Winter argues that the Commission erred in refusing to award it a dispositive preference under section 307(b) of the Communications Act for providing the first local television service to the City of Winter Park, Florida. Metro raises a number of grounds of error, contending principally that the Commission violated the equal protection clause of the Constitution in giving Rainbow credit for minority ownership. On the record before us, we find that the Commission's application for section 307(b) was consistent with FCC precedent. We also find that this case is clearly controlled by *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1027, 105 S.Ct. 1392, 84 L.Ed.2d 782 (1985), in which this court expressly held that the FCC's use of an enhancement for minority status "easily passes constitutional muster." *Id.* at 613. Accordingly, we deny the petitions for review.

I. BACKGROUND

On February 26, 1982, following a rulemaking proceeding, the FCC assigned a new UHF television channel to

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

the City of Orlando, Florida. *Amendment of § 73.606(b), Table of Assignments*, 50 Rad. Reg.2d (P & F) 1714 (1982). Under the Commission's then-existing "15-mile rule," the channel was available for use in communities located within fifteen miles of Orlando.[1] Petitioners Metro and Winter and intervenor Rainbow filed mutually exclusive applications for use of the channel. Metro and Rainbow designated Orlando as their place of license, and Winter specified the neighboring City of Winter Park, but all three applicants proposed to serve the entire Orlando metropolitan area, including Winter Park.

When parties file mutually exclusive applications for use of a broadcast channel in different localities, the Commission first determines whether any of the applicants is entitled to a preference under 47 U.S.C. § 307(b) (1982) for providing first or second local service to a community.[2] If one applicant receives a section 307(b) preference over the others, then that applicant normally will prevail without a comparative hearing. *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1135 (D.C.Cir.1985). If no community is entitled to a section 307(b) preference, or if more than one applicant specifies the preferred community, the Commission then conducts a comparative hearing to evaluate the qualifications of the [**873 F.2d 350**] competing appli-

[1] The rule has since been repealed, *see The Suburban Community Policy*, 93 F.C.C.2d 436, 451-53 (1983), and parties may now apply for use of a channel only in the locality to which it has been assigned. Thus, the section 307(b) inquiry now takes place in the initial rulemaking proceeding to assign the channel to a community, before the channel is open for applications from interested parties.

[2] Section 307(b) requires the Commission "to provide a fair, efficient, and equitable distribution" of broadcast service among states and communities. This provision instructs the FCC to "creat[e] a system of local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.' " *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174, 88 S.Ct. 1994, 2003, 20 L.Ed.2d 1001 (1968) (quoting H.R.Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962)).

cants. *See, e.g., Buena Vista Telecasters,* 94 F.C.C.2d 625, 628 (Rev.Bd.1983).

In a comparative hearing, the Commission weighs both "quantitative" and "qualitative" factors. The quantitative assessment rests on the applicant's proportional integration of ownership into management. If one applicant has a clear quantitative advantage, then that applicant receives the station (assuming that the applicant is otherwise qualified and does not own other media interests). *See, e.g., WHW Enterprises, Inc.,* 89 F.C.C.2d 799, 819 (Rev.Bd.1982), *rev. denied,* FCC 83-368 (Sept. 15, 1983), *aff'd in part and rev'd in part on other grounds,* 753 F.2d 1132 (D.C.Cir.1985). If no applicant has a clear qualitative advantage, then the Commission assesses the applicants' relative strengths on a variety of qualitative factors, including minority ownership, local residence, civic participation, and prior broadcast experience. These qualitative enhancements cannot, however, overcome clear quantitative differences. *See WHW,* 89 F.C.C.2d at 817.

After Metro, Winter and Rainbow filed their applications, the proceeding was assigned to an administrative law judge ("ALJ"), who issued a decision awarding the channel to Metro for use in Orlando. *Metro Broadcasting,* 96 F.C.C.2d 1073 (1983) (Miller, ALJ). The ALJ found that neither the City of Winter Park nor Orlando was entitled to a preference under section 307(b), because the Commission had assigned the channel to the Orlando *area,* Winter Park was "an integral part of the Orlando Urbanized Area," and the center of Winter Park was less than five miles from the center of Orlando. *Id.* at 1087. The ALJ then evaluated the qualifications of the applicants themselves, and disqualified Rainbow for "lack of candor" in its application. Of the remaining two applicants, the ALJ found that Metro had a ninety-nine to ten percent quantitative advantage over Winter and that this advantage, together with Metro's various qualitative enhancements, made Metro an "overwhelming comparative winner" over Winter. *Id.* at 1088.

Winter and Rainbow appealed to the FCC's Review Board ("Board"), which reversed the ALJ on the lack-of-candor issue and awarded the channel to Rainbow.[3] 99 F.C.C.2d 688 (Rev.Bd.1984). The Board agreed with the ALJ that Winter Park was not entitled to a section 307(b) preference. However, the Board reduced Metro's integration credit and found that Rainbow's resulting quantitative advantage was "probably a 'clear' enough difference to be decisional." *Id.* at 703. The Board also concluded, however, that Rainbow was ahead qualitatively. The Board reviewed a number of factors, emphasizing that Rainbow had 90% hispanic ownership participation, whereas Metro had only one 19.8% partner who was black. Overall, the Board concluded:

> [A]lthough the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs Metro's local residence and civil [sic] participation advantage.

Id. at 704.

Winter and Metro appealed to the Commission, which declined review of the Board's decision largely without discussion, stating merely that it "agree[d] with the Board's resolution of this case." FCC 85-558, slip op. at 2 (Oct. 18, 1985). Winter and Metro appealed to this court.

After the cases had been briefed and were awaiting oral argument, the Commission initiated a separate nonadjudicatory proceeding to explore its constitutional and statutory authority for awarding comparative preferences

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[3] Neither Winter nor Metro has sought review of the determination on lack-of-candor.

based on race and gender. *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd. 1315 (1986) (*"Reexamination"*). We then granted the FCC's request for remand to allow the Commission to reexamine whether Rainbow would have [**873 F.2d 351**] received the station absent its preference for minority ownership. On remand, the Commission found that Rainbow had no clear quantitative advantage and that deletion of Rainbow's minority preference could reverse the outcome of the case. 2 F.C.C. Rcd. 1474, 1475 (1987). Accordingly, the Commission ordered the proceeding held on abeyance pending further action in the *Reexamination* proceeding on use of minority preferences.

On December 22, 1987, President Reagan signed into law the continuing resolution for fiscal year 1988, Pub.L. No. 100-202, 101 Stat. 1329 (1987). That resolution contained a provision forbidding the FCC from using any of the appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" its policies to expand minority and female ownership of broadcasting licenses. 101 Stat. at 1331. Congress also ordered the FCC to reinstate prior policy and to lift the suspensions of all proceedings that had been held pending the conclusion of the *Reexamination* proceeding. *See id.* In compliance with this legislation, the Commission reactivated the case and reaffirmed its earlier order upholding the Board's decision to grant Rainbow's application. 3 F.C.C. Rcd. 866 (1988). Thus, the appellants' earlier appeals were reinstated.

II. ANALYSIS

A. Section 307(b)

Winter challenges the finding that it was not entitled to a dispositive preference under section 307(b) of the Communications Act. Orlando currently has five licensed television stations and Winter Park has none, although all

five Orlando stations are received in Winter Park. The parties do not dispute that Winter Park is a city separate and distinct from Orlando. Consequently, Winter argues, the community of Winter Park has a greater need for local broadcast service than does Orlando, and FCC and court precedent require the Commission to accord Winter a dispositive 307(b) preference over the other applicants. We disagree.

In refusing the grant Winter a section 307(b) preference, the Board relied on the FCC policy of defining "community" more broadly in television cases than in radio cases. When a television station is sought:

> "In cases involving mutually exclusive applicants from a principal city and a contiguous suburb, it has been held that where both applicants propose to serve substantially the same areas and populations the term 'communities,' as used in [section 307(b)] of the Communications Act, is not limited in meaning to 'municipalities' but may include metropolitan areas."

Metro, 99 F.C.C.2d at 697 (quoting *St. Louis Telecast, Inc.*, 22 F.C.C. 625, 713 (1957)); *accord Cleveland Television Corp.*, 91 F.C.C.2d 1129, 1136 (Rev.Bd. 1982). In such situations, the city and the suburb comprise a single community, and neither receives a preference over the other under section 307(b).

The Board's decision to deny Winter a section 307(b) preference was fully consistent with this urbanized area policy. All three applicants proposed to place a Grade B signal over the Orlando metropolitan area, including all of Winter Park. Thus, the Board found that there was no reason to award Winter a section 307(b) preference, because all applicants would be serving the same region. *See* 99 F.C.C.2d at 698.

Winter's claim that the Commission has no such urbanized area policy is without merit. The Commission ac-

knowledges that it has applied this policy somewhat erratically in radio cases, *see e.g., Debra D. Carrigan*, 100 F.C.C.2d 721, 725, *reconsid. denied*, 101 F.C.C. 2d 218 (Rev.Bd.1985), *rev. denied*, 104 F.C.C.2d 826 (1986); however, in television cases, there is no doubt that the FCC consistently has refused to grant a suburban community a section 307(b) preference over a central city when all applicants propose area-wide service.[4] [873 F.2d 352] *See, e.g., Cleveland*, 91 F.C.C.2d at 1136; *Buena Vista*, 94 F.C.C.2d 625; *Knoxville Broadcasting Corp.*, 59 Rad.Reg.2d (P & F) 1617, 1622-23 (Rev.Bd.1986); *Charles Vanda*, 8 Rad.Reg.2d (P & F) 427, 433-34 (Rev.Bd.1966); *St. Louis Telecast*, 22 F.C.C. at 627-30.

Moreover, this court has previously found that it is permissible for the Commission to define "community" differently in the radio and television contexts so as to avoid a section 307(b) analysis when wide-area television coverage is proposed. *See New Radio Corp. v. FCC*, 804 F.2d 756, 760 (D.C.Cir.1986). The FCC has broad discretion under section 307(b) to determine the public interest, *see Loyola Univ. v. FCC*, 670 F.2d 1222, 1226 (D.C.Cir.1982), and nothing in the Communications Act prevents the FCC from defining the term "community" differently in different contexts, or from adopting an interpretation that strays considerably from political boundaries, *see e.g., National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1198

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[4] Winter notes that the Commission proposed to adopt its urbanized area policy in a rulemaking proceeding but has not done so. *See The Commission's Policy, Pursuant to Section 307(b) of the Communications Act, of Granting Comparative Preferences Within Metropolitan Areas*, 48 Fed. Reg. 19,428 (1983). Yet, neither has the Commission rejected the proposal; in fact, it has indicated that it will continue to apply the metropolitan area policy on a case-by-case basis until it takes further action in the rulemaking proceeding. *See Debra D. Carrigan*, 100 F.C.C.2d at 731 n. 19 (citing its authority under *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947), to proceed case-by-case rather than by rulemaking).

(D.C.Cir.1984) (upholding FCC approval of cable TV licenses on a nationwide basis and stating that "the constituency to be served is people, not municipalities").

Contrary to Winter's contention, the FCC's refusal to grant a section 307(b) preference to a smaller suburban community over a central city has little to do with the relative sizes of the competing communities or with the type of television station—VHF or UHF—being sought. Rather, the Commission's policy in the distribution of television licenses is based on the characteristics of that medium:

> Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues. Beyond these differences, the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes "should be defined in terms of coverage and not in terms of artifical political boundaries." *Evening Star Broadcasting Co.*, 27 FCC2d 316, 321 n. 4, 20 RR 2d 1311, 1321 n. 3a (1971), *aff'd sub nom. Stone v. FCC*, 466 F.2d 316 (D.C.Cir.1972).

Cleveland, 91 F.C.C.2d at 1137, *quoted in Metro*, 99 F.C.C.2d at 698. Moreover, the Commission has often invoked its urbanized area policy in cases involving UHF licenses. *See e.g., Cleveland*, 91 F.C.C.2d 1129; *Washington's Christian Television Outreach, Inc.*, 99 F.C.C.2d 395, 408-10 (Rev.Bd.1984); *Adell Broadcasting Corp.*, 99 F.C.C.2d 477, 508-10 (Rev.Bd.1984).

In the present case, the Review Board found that "the economic need of a television station to attract sizeable advertising revenues to cover the significant costs involved in its ongoing operation creates a strong presumption—unrebutted in this record—that each applicant will serve the entire Orlando metropolitan area." 99 F.C.C.2d at 698.

The Commission's refusal to award Winter a section 307(b) preference was thus fully consistent with its existing policy regarding award of television licenses to competing applicants in the same metropolitan area.

B. Enhancement for Minority Ownership

Metro, Winter, and the Department of Justice as amicus curiae argue that the Commission's use of a qualitative enhancement for minority ownership violates the equal protection clause of the Fifth Amendment.[5] Although minority ownership is [**873 F.2d 353**] only one of several factors considered by the FCC in awarding broadcast licenses, it may tip the balance in some cases. The issue is before us in this case because the Commission found on remand that Rainbow's enhancement for minority ownership was probably dispositive. *See* 2 F.C.C.Rcd. at 1475.

The issue regarding the legality of the FCC's use of a qualitative enhancement for minority ownership is easily resolved because this case is controlled by our decision in *West Michigan*, 735 F.2d 601. In considering exactly the same policy at issue here, the court in *West Michigan* ruled that "the FCC's plan easily passes constitutional muster," *id.* at 613, for at least two reasons:

> In our analysis two factors stand out as particularly important to our conviction that there is no constitutional infirmity in the FCC's behavior. First, the Commission's award of minority enhancements is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consid-

[5] Metro also challenges the use of gender preferences. However, the Commission determined below that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation. *See* 3 F.C.C. Rcd. at 86, n. 1. Accordingly, we consider only the legality of the FCC's use of a qualitative enhancement for minority ownership.

> eration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters. Second, the Commission's action in this case came on the heels of highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media. Congress found that this situation was a part of "the effects of past inequities stemming from racial and ethnic discrimination." H.R.Conf.Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982), U.S.Code Cong. & Admin.News 1982, p. 2287. Congress must be understood to have viewed the sort of enhancement used here as a valid remedial measure. In giving special weight to these factors we in no way imply that either would be essential to the constitutionality of a government affirmative action program, but their presence places the program's constitutionality beyond question.

Id. at 613-14 (emphasis in original).[6]

Since the decision in *West Michigan*, the Supreme Court has reviewed several challenges to race and gender preferences in employment.[7] However, none of the Court's

[6] Unlike Congress, the FCC does not now base its policy of enhancement for minority ownership on a purpose to cure the effects of perceived racial discrimination. *See* Brief for FCC at 29-30. Rather, the FCC has indicated that its policy is designed to increase the participation of minority groups in the broadcast industry "in furtherance of the public interest goal of diversity of viewpoint—to enhance the public's exposure through programming on broadcast stations to the viewpoints of the significant, diverse groups that make up the nation." *Id.* at 30; *see Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 311-15, 98 S.Ct. 2733, 2759-61, 57 L.Ed.2d 750 (1978) (plurality opinion of Powell, J.); *West Michigan*, 735 F.2d at 614 (noting that "[t]he FCC policy would clearly be validated under Justice Powell's approach" in *Bakke*).

[7] *See generally* Edwards, *The Future of Affirmative Action In Employment*, 44 WASH. & LEE L.REV. 763 (1987); Jones, *The Genesis and*

recent cases has undermined the holding in *West Michigan*. Indeed, even the Justice Department has conceded that *West Michigan* controls the dispositon of this case.

The Supreme Court's recent decision in *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), does not alter this conclusion. In *Richmond*, the Court found that the City of Richmond had violated the equal protection clause by requiring prime contractors for the city to subcontract at least 30% of the dollar amount of their construction contracts to one or more minority business enterprises. A review of the Court's opinions, however, makes clear that *Richmond* does not significantly alter the constitutional framework underlying this court's decision in *West Michigan*. [873 F.2d 354]

The *West Michigan* court, in upholding the FCC's use of a qualitative enhancement for minority ownership, relied primarily on the Supreme Court's earlier decisions in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), and *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). *See West Michigan*, 375 F.2d at 613. Neither of these decisions was repudiated by the Court in *Richmond*. A majority of the Court—the three justices who joined part II of Justice O'Connor's opinion for the Court, and the three dissenters—continues to regard *Fullilove*, in which the Court upheld a congressional program creating a 10% minority set-aside for federal construction contracts, as good law. *See Richmond*, ___ U.S. at ___-___, 109 S.Ct. at 717-20 (plurality opinion); *id.* at ___-___, 109 S.Ct. at 750-52 (Marshall, J., dissenting); *see also id.* at

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Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities, 70 IOWA L.REV. 901 (1985); Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV.L.REV. 658 (1989); Sullivan, *The Supreme Court, 1985 Term—Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV.L.REV. 78 (1986).

-___, 109 S.Ct. at 735-38 (Scalia, J., concurring in the judgment) (declining to revisit *Fullilove*). Indeed, Justice O'Connor relied heavily on the reasoning of *Fullilove* and was careful to point out why the facts of *Richmond* compelled a different result. *See* ___ U.S. at ___-___, 109 S.Ct. at 717-20, 728-29. Similarly, none of the opinions in *Richmond* expresses any disagreement with *Bakke*, in which Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination. *See Bakke*, 438 U.S. at 311-15, 98 S.Ct. at 2759-61 (plurality opinion). Accordingly, the constitutional foundation for *West Michigan* remains intact.[8]

Moreover, the Supreme Court in *Richmond* stressed two crucial differences between the set-aside program upheld in *Fullilove* and the plan struck down in *Richmond*, and in both respects the FCC's policy is more similar to the *Fullilove* program found constitutional than to the *Richmond* plan.

First, the Court emphasized that the Richmond plan involved "an unyielding racial quota," ___ U.S. at ___, 109 S.Ct. at 724, in contrast to "the flexible nature of the 10% set-aside" upheld in *Fullilove*, *id.* at ___, 109 S.Ct. at 718. The FCC's policy, however, is even more flexible than the *Fullilove* set-aside plan: it does not in-

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[8] Most of the Supreme Court's other recent cases involving challenges to affirmative action have upheld the legality of these plans in the employment context. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d. 615 (1987); *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed. 2d 203 (1987); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). The only notable exception has been *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). Together, these cases surely do not undermine this court's decision in *West Michigan*. Furthermore, none of these cases calls into question either *Fullilove* or *Bakke*.

volve any quotas or fixed targets whatsoever, and minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses. In fact, the Commission would not even have considered minority ownership if it had found that the City of Winter Park was entitled to a dispositive preference over the City of Orlando under section 307(b).

Second, the *Richmond* Court made a distinction between programs enacted by Congress and those adopted by states or local governments. The Court observed that the *Richmond* plan was adopted by a city council, which had no specific constitutional mandate to enforce the Fourteenth Amendment; rather "[s]ection 1 of the Fourteenth Amendment is an explicit *constraint* on state power." ___ U.S. at ___, 109 S.Ct. at 719 (emphasis in original). The plan upheld in *Fullilove*, by contrast, was passed by Congress, which has "unique remedial powers . . . under § 5 of the Fourteenth Amendment." *Richmond*, ___ U.S. at ___, 109 S.Ct. at 718. In reviewing a congressional program, the Court emphasized,

> "we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state or federal,* [873 F.2d 355] *does there repose a more comprehensive remedial power than in the Congress,* expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." [*Fullilove,*] 448 U.S., at 483, 100 S.Ct. at 2777 (plurality opinion) (emphasis added).

Richmond, ___ U.S. at ___, 109 S.Ct. at 718.

Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses. *See* Pub.L. No. 97-259, § 115, 96 Stat. 1087, 1094-95, *codified at* 47 U.S.C. § 309(i)(3)(A), (C)(ii) (1982) (mandating use of minority preferences in lottery assignments); Pub.L. No. 100-204, 101 Stat. at 1331 (continuing resolution). "Any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *West Michigan*, 735 F.2d at 615.

The FCC has indicated that it intends to adhere to its policy and we have no authority to overturn the agency's judgment on this point. *West Michigan* disposed of the constitutional challenges to the use of enhancements for minority ownership, and we are bound to follow this law of the circuit. *See Brewster v. Commissioner*, 607 F.2d 1369, 1373 (D.C.Cir.), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979).

C. Other Issues

Aside from the section 307(b) and constitutional issues, which were the main arguments on which the parties focused in oral argument and in the briefs, Metro also raised a number of other arguments that we find to be moot or to lack merit.

First, Metro argues that the Commission erred in its assessment of Metro's and Rainbow's comparative quantitative integration of ownership into management. However, the Commission in fact agreed with Metro that the ALJ gave Metro too little credit for one of its partners, and the Commission rejected the ALJ's finding that Rainbow's quantitative advantage over Metro was probably decisive. *See* 2 F.C.C. Rcd. at 1475. Rather, the Commission found that neither party had a clear quantitative advantage over the other. *See id.* Although the Commission did not go as far as Metro would like and thus did not find that Metro had a quantitative advantage over Rainbow, the Commission's determination is entitled to considerable deference, *see Office of Comm'n of the United Church of Christ v. FCC*, 707 F.2d 1413, 1424-25 (D.C.Cir.1983), and we

find nothing in the record to suggest that it should be overturned.

Metro also contends that the 1987 continuing resolution, which directed the FCC to resolve the present case within sixty days in a manner consistent with the Commission's existing policies, was an unconstitutional bill of attainder. However, "[t]he proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group." *Selective Serv. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851, 104 S.Ct. 3348, 3354, 82 L.Ed.2d 632 (1984). Metro has made no argument that Congress' action imposed punishment on Metro. Although part of the same continuing resolution aimed at one individual, Robert Murdoch, was found unconstitutional in *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C.Cir.1988), the court in that case found that Congress had denied Murdoch a waiver that was available to all other applicants. In the present case, by contrast, Congress simply ordered the FCC to adhere to established substantive policies in resolving broadcast license disputes; Congress did not purport to instruct the agency how to decide any particular case on the merits. Congress neither singled out Metro nor directed that Metro be punished, and the continuing resolution was therefore not a bill of attainder as applied to Metro.[9] [873 F.2d 356]

III. CONCLUSION

We find that the Commission's refusal to accord Winter a dispositive preference under section 307(b) was consist-

[9] The other issues raised by Metro are moot. Metro argues that it should have been awarded "substantial" rather than "moderate" credit for local residency, and that Rainbow should not have been given a substantial preference over Metro for broadcast experience. The Commission indicated, however, that neither of these issues affected the outcome of the proceeding. *See* FCC 85-558 (Oct. 18, 1985); 2 F.C.C.Rcd. at 1475. Metro's charges against Winter are also moot, as we have upheld the Commission's determination that Winter was not entitled to the station.

ent with its previous interpretations of that section. We also find that our prior decision in *West Michigan* controls the disposition of the case with respect to the FCC's use of a qualitative enhancement for minority ownership. Accordingly, the petitions for review are denied.

So ordered.

STEPHEN F. WILLIAMS, Circuit Judge, concurring in part and dissenting in part:

I am in full agreement with the majority's treatment of Winter Park's § 307(b) claim and of the issues addressed in part II.C. of the opinion. I dissent from the majority's constitutional analysis. The critical factor inducing the Commission to award the license to Rainbow was that its 90 percent credit for Hispanic ownership outweighed Metro's 19.8 percent credit for black ownership. Although in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir.1984), our circuit found it constitutional for the Commission to make race pivotal in the allocation of a radio channel, I believe that case has been largely undermined by the Supreme Court's more recent decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), and *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

The Commission and intervenors on its side assert two possible constitutional justifications for the FCC's minority preference policy. First, the FCC claims that its policy fosters diversity in broadcast programming, a "non-remedial" purpose. See FCC Brief at 29-31. I do not believe the justification can survive the *Croson* Court's analysis, particularly its indictment of racial stereotyping. Second, Rainbow claims that the FCC's policy is also designed as a remedy for the effects of "historical underrepresentation of minorities in broadcasting," independently of any link to broadcasting diversity. See Rainbow Brief at 22 and generally at 21-26.[1] As the Commission itself never articulated this remedial theory, the theory cannot sustain the decision here unless Congress mandated Commission use of racial preferences even in the event of the collapse of the Commission's own justification. See Continuing Resolution of December 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329; Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub.L. No. 100-459, 102 Stat. 2186 (1988). Particularly in light of the doubts created by *Wygant* and *Croson* as to whether this alternative theory could shore up the constitutionality of the Commission's policy, I believe the case should be remanded to the Commission for it to interpret Congress's directions.

[1] The FCC's counsel asserts that the Commission has not adopted this latter, so-called "remedial" rationale for its minority preference policy. See FCC Brief at 30 ("The FCC's goal in implementing the preference policy, however, has not been to remedy prior discrimination against minorities or to provide remedial benefits.").

I. The Program Diversity Purpose

The word "diversity" comprises a multitude of goals and methods. The Commission has adopted, and the Supreme Court approved, "cross-ownership" rules intended by the Commission to deconcentrate ownership and thereby to foster diversity of viewpoints. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978). But despite the Commission's using the word "diversity" to label the goal of its racial preferences, the approaches have al- [**873 F.2d 357**] most nothing in common. Deconcentrating ownership bears no resemblance to allocating licenses on the basis of the applicants' race, for the purpose of generating programs "targeted" at specific ethnic groups.

The FCC notes in its brief that "the purpose of the [minority preference] policy has been clearly explained by the Commission and Congress as being to enhance program diversity by increasing ownership of stations by significant groups that are substantially underrepresented in station ownership." FCC Brief at 47 n. 47. If the Commission's purpose were ethnically proportional representation of programmers for its own sake, its action would be clearly unconstitutional in the absence of a remedial

justification. As Justice Powell said in *Bakke*, "[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Regents of the University of California v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 2757, 57 L.Ed.2d 750 (1978); see also *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967) ("this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943)).

At several points the Commission's arguments suggest that the stated program diversity goal has in fact dissolved into a simple quest for racial or ethnic proportionality in license ownership. The Commission has never developed any data suggesting that the listening or viewing tastes of any ethnic group are either distinctive or undersupplied. Indeed, responding to the argument that its present scheme is of unlimited duration (because there is no measureable goal whose attainment would call a halt), its brief simply referred the reader to data on minority underrepresentation in license *ownership*. See FCC Brief at 47 n. 47, referring to *id.* at 30 n. 33. Nonetheless, I take the Commission at its word—or better—and examine the program-diversity rationale on the premise that it is genuine.

Under the view adopted by a majority of the Supreme Court for the first time in *Croson*, race-based decision criteria must withstanding "strict scrutiny" to survive an equal protection attack. See *Croson*, ___ U.S. at ___, 109 S.Ct. at 721 (Part III-A)[2]; *id.* at ___, 109 S.Ct. at 735

[2] Justice O'Connor wrote a six-part opinion in *Croson*. A majority of the Court agreed to three of those parts—I, III-B and IV. All citations to these majority statements will be in the usual form, without parenthetical reference to authorship. Part II of Justice O'Connor's opinion

(Scalia, J., concurring); see also *id.* at ___, 109 S.Ct. at 752 (Marshall, J., dissenting) (noting it as *novel* aspect of majority decision). More specifically, the government's goal must be a "compelling" one and the means selected must be "narrowly tailored" to fulfillment of that goal.

In asserting the compelling character of the goal of program diversity, the Commission seeks to ride on Justice Powell's endorsement of a "diversity" rationale in the context of educational admissions policy. See *Bakke*, 438 U.S. at 311-12, 98 S.Ct. at 2759-60. But the diversity purportedly sought by the Commission is altogether different from what Justice Powell would have sanctioned. Ethnic diversity in the classroom enables those present to see individual members of ethnic groups as they are. Far from depending on some link between race and conduct, it is a potent device *against* ethnic stereotyping. In his dissent in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), Justice Stevens made just this point—that the "inclusion of minority teachers in the educational process inevitably tends to *dispel* [the] illusion" that skin color is a proper basis for inferring character or conduct. *Id.* at 316, 106 S.Ct. at 1869 (emphasis added).

Observers of programming from a minority-owned station, of course, cannot see [**873 F.2d 358**] the owners and thereby learn the irrelevance of race to conduct. Indeed, the Commission believes that viewers who could do so would learn what it apparently believes already—that skin color is a sound basis for predicting behavior. For the Commission's theory to make sense, in fact, skin color or ethnicity must be an excellent clue not only to what owners want to provide but also to what viewers and listeners

was joined by Justices Rehnquist and White. Parts III-A and V were joined by Justices Rehnquist, White and Kennedy. All citations to these plurality portions of the opinion will include the relevant part number, but will not specify authorship.

want to receive. Its race preference plan is based at the core on precisely the racial stereotyping that the *Croson* majority identified as the central evil in the use of race-based decision criteria. See ___ U.S. at ___, 109 S.Ct. at 721 (Part III-A); *id.* at ___-___, 109 S.Ct. at 730-34 (Stevens, J., concurring); *id.* at ___, ___, 109 S.Ct. at 735, 739 (Scalia, J., concurring).

Sustaining the program diversity theory would require the court to have some basis for believing that minority ownership would *lead to* "minority programming" in some sense that is both intelligible and permissible, and, second, that broadcast offerings are not currently "diverse." There is no basis in the record for either. No party here has offered a definition of minority programming that is empirically verifiable and can serve as a goal that government may constitutionally pursue. Thus it is not surprising that the data do not support any claim that the Commission's racial decision criteria are even reasonably (much less "narrowly") tailored to fulfill any constitutional goal. Moreover, the only data to which our attention has been called, taken at face value and assuming arguendo that they are meaningful in terms other than pure racial stereotyping, suggest that the goal posited by the Commission has been achieved quite independently of its racial decision criteria.

As Judge Silberman has shown in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600, ___ F.2d ___ (D.C. Cir. March 31, 1989), Congress made no findings which support the theory of a nexus between race and diverse programming when it adopted a lottery system for allocating broadcast licenses. See *Shurberg*, Silberman op. at ___-___ ("Nowhere in the House report [H.R.Rep. No. 765, 97th Cong., 2d Sess. (1982) U.S.Code Cong. & Admin.News 1982 p. 2237][3] is there evidence presented of a

[3] The report explains the House-Senate conference's approval of § 115

nexus between program diversity and minority ownership, nor is there reference to evidence upon which the committee drew."). Nor was this evidentiary void filled by the Continuing Resolution in 1987. See Pub.L. No. 100-202, 101 Stat. at 1329-31; *Shurberg*, Silberman op. at ___ (S.Rep. No. 182, 100th Cong., 1st Sess. 76 (1987), added only an assertion that "[d]iversity of ownership results in diversity of programming and improved service to minority and women audiences.").

Several parties in this case urge that a Congressional Research Service Report, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988), proves a link between minority ownership and diverse programming. See FCC Brief at 46-47; Rainbow Brief at 24. Examination of the CRS Report is valuable not so much for what it proves—which as I will try to show is very little—as for what it suggests about the inevitable collapse of *any* evidence purporting to link racial criteria for station allocation with a goal of program diversity.

In preparing the study, the Service examined data from nearly 9000 responses to an FCC survey of about 11,000 American radio and television stations. See CRS Report at 2. The survey first asked station owners what percentage of the ownership interest in their station was held by women or members of specific minority groups.[4] It then sought data on programming conduct. Both radio and TV station owners were asked whether their programming was directed to or provided special services for any of nine listed groups, including specific minorities, women, children [**873 F.2d 359**] and senior citizens. Respondents were

of the Communications Amendments Act of 1982, Pub.L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. § 309(i)(3)(A) and (C)(ii)).

[4] The minority groups were Black (not of Hispanic origin), Hispanic, American Indian or Alaskan Native, and Asian or Pacific Islander.

asked to state whether the targeting or format was for 1-19 hours per week or for more than 20 hours per week.

The CRS found some correlation between minority ownership and "audience-targeted" programming. Whereas only 20 percent of stations without any black ownership responded that they engage in "black programming," 65 percent of stations with black ownership said that they did so. *Id.* at 13. For Hispanic ownership and "Hispanic programming," the corresponding figures are 10 percent and 59 percent. *Id.* at 13, 15. Without employing any of the conventional paraphernalia of modern statistics, the CRS hesitantly inferred a causal connection:

> [T]here is a strong indication that minority and women station ownership results in a greater degree of minority programming [than does nonminority ownership]. Therefore, an argument can be made that FCC policies that enhanced minority and women station ownership may have resulted in more minority and other audience targeted programming. To the degree that increasing minority programming across audience markets is considered adding to programming diversity, then, based on the FCC survey data, an argument can be made that the FCC preference policies contributed, in turn, to programming diversity.

Id. at cover page.

First I will note a rather plain methodological flaw in the survey and then turn to its basic conceptual defect. The designers of the survey made no effort to adjust for possible differences in the racial composition of the various station owners' potential audiences. This makes it impossible to examine the role of market demand as a force behind programming decisions. "Hispanic-targeting"[5] is ob-

[5] I assume for the sake of argument that "Hispanic targeting" has an intelligible meaning. If it is a fancy phrase for Spanish-language programming, then indeed it would.

viously more likely to be profitable in Miami than in Minneapolis. Thus, if specific minorities are more likely to own stations in areas where they are numerous (as seems likely), the difference in "targeting" that the Report hesitantly attributes to the owners' racial characteristics may be due simply to their rational responses to demand. The Report itself acknowledged that it "would be difficult to determine to what degree station programming strategies are market driven rather than the results of minority ownership interest." CRS Report at 3.

Far more critical than this methodological flaw, however, is the survey's failure to define "minority-targeted programming." As the survey omitted that vital step, it and the Report prove only that black owners are more likely to *say* that they target black audiences, Hispanic owners that they target Hispanic audiences, and so on.

One can easily understand why the Commission refrained from defining black-targeted or other "minority-targeted" programming. The entire exercise would almost necessarily have constituted the crudest type of racial stereotyping. I say "almost" advisedly. It is conceivable that survey data might support the notion that blacks (say) had a greater taste for some specific programming feature. *If* that were true as an empirical matter, it would not be racist to say so. But if it were, and if it is permissible for the Commission to pursue program diversity by means other than general dispersion of ownership, it would simply expose the availability of a non-race-specific solution for the Commission: it could ascertain whether that sort of programming was underrepresented in relation to demand and take such steps as might be constitutionally available to stimulate its supply. If the answer is that there are no constitutionally permissible steps that it might take, then it is hard to see why the Commission has *greater* authority to stimulate the supply by its present means—which are not only roundabout but race-based.

The Commission avoided obvious racial stereotyping in its survey design by the blunt device of refusing to define the various types of "minority" programming at issue. The omission renders its data meaningless. It also tends to undermine any [873 F.2d 360] claim by the Commission that its goal was "compelling": no one can seriously argue that there is a compelling governmental interest in increasing the proportion of station owners who *say* they engage in something they *call* minority programming.

The Commission's goal also appears indeterminate, so that neither the Commission nor any observer will ever be able to discern that it has been attained. But all members of the Court appear to agree that a racial preference cannot be considered a "narrowly tailored" means if it can never reach its stated end. See, e.g., *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1067, 94 L.Ed.2d 203 (1987) (Brennan, J., for himself and Justices Marshall, Blackmun and Powell) (among factors determining whether race-conscious remedies are appropriate are "the flexibility and duration of the relief"). In *Croson* four members of the Court severely criticized theories that "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." ___ U.S. at ___, 109 S.Ct. at 723 (Part III-A). They rejected outright remedies "that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* (quoting *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848 (plurality op.)). Although the other two concurring Justices did not join that portion of the Court's opinion, their opinions show no greater tolerance of racial preferences that have no clearly specified goal whose attainment will bring the preference to an end. See ___ U.S. at ___, 109 S.Ct. at 730 (Stevens, J., concurring) ("When [government] creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification

is imperative.") (quoting *Fullilove*, 448 U.S. at 552-54, 100 S.Ct. at 2813-14); ___ U.S. at ___, 109 S.Ct. at 738 (Scalia, J., concurring) ("[T]he remedial power extends no further than the scope of the continuing constitutional violation. . . . And it is implicit in our cases that after the [violative] school system has been completely disestablished, the States may no longer assign students by race.").

The stated goal here—some sort of optimal or proportional relation of programming to ethnic taste—is undefined and seemingly not definable except in racial terms. Plainly there can be no assurance of an end to the racial preference if there is no way—except the Commission's conclusory say-so—of ascertaining when the goal is reached.

The Commission gives some clue as to how in fact it would measure the attainment of its goals. Its response in this very case to the argument that the minority preference was "open-ended as to duration" was to point to the figures comparing the percent of minorities in the population with the percent of stations owned and controlled by minorities. See FCC Brief at 47 n. 47, referring to *id.* at 30 n. 33. Thus the Commission apparently intends to stop only when proportionality in ownership is attained. Whatever the Commission may think it is doing, its stated criteria indicate that its supposedly nonremedial program-diversity goal is only a stalking horse for making license ownership replicate the racial proportions of the population at large.

The Commission might escape the challenge of defining its programming goal by positing the existence of some ineffable attribute of programming by minorities, arising out of such elements as may be common to the experience of the specific minority group. To the extent that such an attribute exists, one could say that, *by definition*, programming by minority-owned stations will reflect the ineffable characteristic. There would be no empirical problem.

This response would prove too much. If government may simply assume some inherently non-measurable race-conduct link and pursue diversity of conduct by allocating government benefits on a basis of racial proportions, then obviously there is no constitutional obstacle to race-based decision criteria. The Commission would be free to orchestrate an ethnically defined array of radio and TV programs, each designed to match "black tastes," "white [873 F.2d 367] tastes," "Hispanic tastes" or "Asian-American tastes"—or, indeed, as its ethnic analysts advanced in sophistication, "Jewish tastes," "WASP tastes" or "Italian tastes." Neither *Croson* nor any of the Court's decisions in the field can stand for this.

Thus the CRS study not only fails to supply the Commission's factual premises but suggests that it is asking questions that are unanswerable without racial stereotyping.

For a reader willing to ignore these flaws, however, the Report leads to the conclusion that the Commission has already achieved its purported goal. For purposes of testing the relation between "minority-targeted" programming and minority populations, the Commission considered data from ten cities grouped into two categories, one with five large Standard Metropolitan Statistical Areas ("SMSA") and the other with five smaller cities. See *id.* at 349 & n. 1. The study's data show that *non*minority-owned programmers produce minority-targeted formats in percentages *higher* than the percentages of the various minorities in the general population for every minority group in both types of cities. For the five large cities the data are as follows:

	Percent of Population	Percent of Nonminority[4] Stations Broadcasting to Target Minority
Black	17.6	22
Hispanic	14.9	20
Asian/Pac	3.3	5
Ind/Alask	1.7	3

CRS Report at 25, 61-64.

Similarly, in the five smaller cities, nonminority broadcasters also appear to "target" minority audiences in greater percentages than would be called for by their raw proportions of the population:

	Percent of Population	Percent of Nonminority Stations Broadcasting to Target Minority
Black	9.8	24.2
Hispanic	3.4	26.4
Asian/Pac	.44	27.2
Ind/Alask	1.4	26.4

Id. at 26, 73-76. If black-targeted programming as the term is used by the survey respondents has any meaning that is related to some permissible goal, the Commission should declare victory.

This court's 1984 decision in *West Michigan*, sustaining the Commission's racial diversity rationale, cannot survive *Croson*. There a majority of the Supreme Court for the first time insisted on "strict scrutiny" of racial preferences. See above at 349-350. Moreover, that opinion gave unprecedented weight to precisely the criteria under which the Commission's rationale is vulnerable and that *West Michigan* disregarded. First, while *West Michigan* makes

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[4] "Nonminority" as used here and in the following table means not belonging to the specific minority "targeted."

no mention of the hazards of racial stereotyping, the prevailing opinions in *Croson* all express the justices' concern that in the absence of strict judicial review, the political branches' use of racial criteria may reflect and reinforce racial stigmatization. See above at 350. While *West Michigan* casually asserted that the "FCC comparative evaluation process generally conforms to Justice Powell's model," 735 F.2d at 615, the *Croson* Court's evident concern over stereotyping requires us to probe seriously the FCC's assumptions about race as a predictor of conduct—an empirical matter irrelevant to Justice Powell's diversity theory.

Second, the justices' statements of concern that racial preferences may drag on interminably, see above at 352, have no parallel in *West Michigan*—an omission that is hardly surprising as those statements appear to have no roots in prevailing opinions issued before *West Michigan*. (Justice Stevens's statement is taken from his *dissent* in *Fullilove*.) Indeed, *West Michigan* never so much as mentioned the requirement of "narrow tailoring."

I therefore believe that *Croson* fatally undermines *West Michigan*'s conclusory validation of the Commission's racial diversity rationale.

II. The Remedial Purpose

If the Commission's racial preference cannot withstand the equal protection challenge on the basis of its program diversity [873 F.2d 362] purpose, the next question is whether the *intervenor*'s remedial theory fills the gap. One difficulty, obviously, is the theory's possible constitutional infirmity. But the court need reach that issue only if the preference is otherwise a proper exercise of the Commission's authority. It can be such an exercise only if (a) the Commission has properly adopted a remedial program in the discharge of its general authority to advance the public interest in the allocation of licenses *or* (b) if Congress has

mandated such a remedial program. The first possible basis is clearly absent here; the Commission has never sought to explain its racial preference as an attempt to remedy discrimination. The second basis is highly doubtful; Congress's instructions in the Continuing Resolution of December 22, 1987, Pub.L. No. 100-202, 101 Stat. 1329, 1329-31 (1987), and the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub.L. No. 100-459, 102 Stat. 2186, 2216-17 (1988), are at best ambiguous. The legislative histories do not support a broad reading of the language used by Congress, and in light of what are at least serious doubts about the constitutionality of any such remedial program on the present record, I believe the appropriations acts do not clearly mandate more than continuation of the Commission's preexisting program of racial preferences for purposes of program diversity.

A. *The Commission's Stated Purpose*

At no time has the Commission sought to explain or justify the racial preference now before us as a remedy for racial discrimination. Under well-established principles of administrative law, we cannot uphold a Commission action on the basis of reasoning that the Commission has not adopted. *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943) ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.").

The background of the Commission's policy is no secret. In *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir.1973), this court overturned a Commission decision that had refused to award a license applicant credit for minority ownership. Noting that the Commission had rested its efforts to diffuse ownership on the belief that such diffusion would bring about diverse program content, the court declared

that the goal of maximum diversification of ownership entailed "favorable consideration to an applicant who ... gives a local minority group media entrepreneurship." *Id.* at 937. The court appeared to make the credit contingent upon a showing that the minority ownership would be likely to enhance diversity of content:

> We hold only that *when* minority ownership *is likely to increase* diversity of content, especially of opinion and viewpoint, merit should be awarded.

Id. at 938 (emphasis added) (citations omitted).

In *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir.1975), the court reviewed another Commission decision declining to award credit for minority ownership, where the applicant had offered no evidence either of dissatisfaction among minorities with existing programs or of any plan to cure it. Despite having appeared in *TV 9* to make credi turn on specific circumstances indicating a likelihood of program diversity, the court now stated that "black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry." *Id.* at 1063.

The Commission responded to these developments. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978). In the Minority Ownership Report of its Minority Ownership Task Force, it stated:

> Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8500 commercial radio and television stations currently operating in this country. **[873 F.2d 363]**
>
> Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities.

Federal Communications Commission, Minority Ownership Taskforce Report, Minority Ownership in Broadcasting 1 (May 17, 1978) (emphasis in original).

The references to "underrepresentation" are not linked, of course, to any claim of discrimination. The Commission's rationale remained the one consistently articulated by this court—an extension of the idea that ownership diversity would entail program diversity.

The Commission has, indeed, explicitly abjured any remedial purpose. As it says in its brief here, "[T]he FCC's goal in implementing the preference policy ... has not been to remedy prior discrimination against minorities or to provide remedial benefits." FCC Brief at 30. Further, in its Brief on Rehearing *En Banc* at 18, *Steele v. FCC*, 806 F.2d 1126 (D.C.Cir.1986), it declared the absence of the sort of factual underpinnings best suited to support any such remedial purpose: "There has never been a finding, nor so far as we know even an allegation, that the FCC engaged in prior discrimination against racial minorities or women in its licensing process." Because of its lack of any remedial purpose, it has, of course, never sought to analyse whether past discrimination affords any basis for such a program.

If we assess the Commission's racial preference as an exercise of its mandate to pursue the public interest, and if I am correct in finding that *Croson* and *Wygant* have toppled *West Michigan*'s constitutional validation of the program diversity theory, then the Commission's lack of any effort to support racial preferences as a remedy for discrimination would normally require a remand to the Commission for such further consideration as it found ap-

propriate. Such a remand would be inappropriate, however, if Congress had mandated a remedial program. I therefore turn to the relevant appropriations acts for 1988 and 1989.

B. *The Appropriations Acts*

In appropriating funds for fiscal year 1988, Congress provided:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended 52 R.R.2d [1301] (1982) and *Mid-Florida Television Corp.*, [69] F.C.C.2d 607 Rev.Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the injury [sic] . . . .

Pub.L. No. 100-202, 101 Stat. 1329-31 (1987). Congress renewed this spending prohibition in the relevant appropriations measure for fiscal year 1989. See Pub.L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (same language). Accordingly, the Commission proceeded to resolve the present licensing dispute by reference to the preexisting policy. See *Metro Broadcasting, Inc.*, 3 F.C.C. Rcd 866 (1988).

If Congress had enacted the racial preference here at issue into law, of course, that preference would be a part of the law governing the Commission's license allocation activities; the Commission would be bound to apply it, and

we to uphold the application in the absence of constitutional [**873 F.2d 364**] defect. But that is not what Congress did. It ordered a kind of mental standstill, prohibiting the use of funds appropriated under the acts to "repeal, to retroactively apply changes in, or to continue a reexamination of, the [specified] policies," "other than to close" the docket in which the Commission was reexamining its various racial and gender preferences "with a reinstatement of prior policy." In this context "policy" is ambiguous. So far as comparative licensing is concerned, the laws do not state whether the permissible policy, i.e., the one which the Commission *may* spend the appropriated funds to reinstate, is the Commission's pre-existing pursuit of program diversity through racial preferences, or outright racial preferences for some other (unspecified) purpose. Thus they do not address what the Commission should do if it applies *its* prior policy (defined in the only terms that the Commission has ever articulated), and the policy as so defined and rationalized is found constitutionally defective.

In at least two respects the context of the appropriations acts militate against reading them as mandating the use of racial preferences even if the Commission's diversity-based ones are unconstitutional. First, it would seem anomalous for Congress to lock the Commission into a policy broader than it had ever before applied without specifically articulating the new policy and its bases. Second, as the restriction is limited in time to the period of the Commission's reliance on the appropriated funds, the Commission would be free to abandon the policy thereafter, a result that seems especially curious for a *new* policy.

The legislative history of the Continuing Resolution does not entirely clarify Congress's intent, but it contains no hint that Congress contemplated an enlarged reading of the FCC's "policy." The restriction was added to H.R. 2763 during Senate committee hearings, with the statement that the FCC's reexamination of the minority pref-

erence policies was "unwarranted." S.Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). The Report went on to note that "Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences." *Id.* The only other specific references to the minority preference policy that I uncovered in the legislative history were brief remarks by Senator Lautenberg during the Senate discussions of H.R. 2763. In supporting the amendment, which he had proposed, Senator Lautenberg echoed the Report's focus on program diversity:

> Important goals of our communications policy should be the promotion of diverse viewpoints, and service to diverse audiences. To meet these goals, it is important that we promote diversity of ownership of broadcast licenses. . . . Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

133 Cong.Rec. S14395 (daily ed. October 15, 1987) (statement of Sen. Lautenberg). Obviously, neither of these expressions refers to any remedial purpose.

Similarly, the legislative history of the 1989 appropriations restriction gives no reason to believe that Congress was imposing a remedial rationale on the agency. The spending prohibition in the relevant act for 1989 was introduced in the Senate committee report, S.Rep. No. 100-388, 100th Cong., 2d Sess. 78-79 (1988). The sole remarks concerning this addition were that "[t]he Committee has also continued language from previous appropriations acts with regard to VHF-UHF swaps and minority and women ownership of broadcasting licenses." *Id.* at 79. Senator Hollings was the only legislator who spoke on the minority ownership provision during either the House or Senate

debates on the bill. He discussed the CRS Report, which had been recently issued, and said:

> The report clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves.
>
> The FCC's rationale for questioning the constitutionality of the minority/female ownership policies is factually and [**873 F.2d 365**] legally invalid. I am a strong supporter of diversity in ownership and programming. . . . *The language in this year's appropriations bill simply preserves long-standing policies of both the Congress and the FCC.* . . .

134 Cong.Rec. S10021 (daily ed. July 27, 1988) (statement of Sen. Hollings) (emphasis added). Thus the legislative history of the 1989 appropriation, like that for 1988, appears to evidence only a congressional wish to continue the policy of trying to enhance program diversity.

Serious doubts about the constitutionality of a remedial rationale for the Commission's racial preference rule also call for a narrow reading of the appropriations acts. *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932).[7] It is true that in *West Michigan* this court relied on a remedial purpose to support its finding of the preference's constitutionality. See 735 F.2d at 614-16. But as the *FCC*'s purpose was exclusively to promote programming diversity, only that purpose was properly under

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[7] The principle that statutes should be read so as to avoid constitutional questions where fairly possible appears to extend to situations like this one, in which the event casting doubt on a statute's constitutionality (here, the decision in *Croson*) occurs *after* Congress enacted the law. See, for example, *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367-75, 91 S.Ct. 1400, 1403-08, 28 L.Ed.2d 822 (1971) (federal statute written in 1930 interpreted to incorporate 14-day time limit on commencement of forfeiture proceedings, and 60-day limit on their completion, both inferred from 1965 decision of Supreme Court).

review. The portion of *West Michigan* addressing remedial concerns is therefore dictum.

Even were *West Michigan* a holding on the remedial purpose, its reasoning appears largely undermined by *Wygant* and *Croson*. First, it accepted findings of past discrimination that are likely insufficient under present standards. Second, it completely neglected the question whether the "remedy" was "narrowly tailored," an issue now likely to be critical.

Discrimination. The *West Michigan* court noted that the allocation there under review "came on the heels" of Congress's passage of § 115 of the Communications Amendments Act of 1982, Pub.L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. § 309(i)(3)(A) and (C)(ii)), authorizing Commission use of lotteries for license allocation but subjecting such lotteries to special minority preference requirements. 735 F.2d at 613, 615-16. The court noted that Congress had based the preference requirements on findings of "underrepresentation" of minorities in the broadcast media and had characterized this underrepresentation as flowing from " 'the effects of past inequities stemming from racial and ethnic discrimination.' " *Id.* at 614 (quoting H.R. Conf.Rep. No. 97-765; 97th Cong., 2d Sess. 43 (1982), U.S.Code Cong. & Admin.News 1982, p. 2287). The court read the enactment of the lottery provisions under these circumstances "as giving congressional confirmation to the factual bases of [the] remedial nature [of the FCC's various minority preference policies]." 735 F.2d at 616.

I agree with Judge Silberman's conclusion in *Shurberg* that these "findings" are inadequately supported to show prior discrimination by the FCC or the broadcast industry. See *Shurberg*, Silberman op. at ___ ("Neither Congress nor the FCC ever found any evidence to link minority 'underrepresentation' to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry.") (citation omitted); see generally *id.* at ___ -

___. In the absence of findings of any discrimination by the agency or in the industry, the congressional statements can sustain the preference only if general societal discrimination suffices to support a race-based remedial program.

Three Supreme Court decisions are relevant to an assessment of such general discrimination: *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), *Wygant*, and *Croson*. In *Fullilove* the Court upheld a 10% minority set-aside program established by Congress for federal grants to state and local governments for use in public works projects. Both Chief Justice Burger's plurality opinion and Justice Powell's concurrence stressed Con- [873 F.2d 366] gress's unique role in ensuring equal protection under the Fourteenth Amendment. See 448 U.S. at 472-78, 100 S.Ct. at 2771-75, *id.* at 503-06, 100 S.Ct. at 2787-89 (Powell, J., concurring). Both opinions, however, left obscure the extent to which Congress's special role left it free to mandate racial preferences solely on the basis of general societal discrimination. Justice Powell read the record as showing that Congress had made a particularized finding of discrimination by the governmental unit involved: "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.* at 503, 100 S.Ct. at 2787 (citation omitted). The plurality was less clear on whether the identified discrimination was specifically in the contracting business, or merely in society at large. The opinion declared that Congress "had before it . . . evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination. . . ." *Id.* at 478, 100 S.Ct. at 2774.

In *Wygant*, where the Court invalidated a purely local racial preference, the plurality's holding and rationale appeared to reject generalized findings of discrimination as a basis for race-based remedial measures. In his plurality opinion, Justice Powell observed that the Court had never held that societal discrimination alone sufficed to justify a racial classification. "Rather, the Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274, 106 S.Ct. at 1847 (emphasis added). While the Court held that there need not be "findings" of prior unlawful discrimination, it did require that a "firm basis" exist for believing that the public entity had engaged in discrimination. *Id.* at 293, 106 S.Ct. at 1856 (O'Connor, J., concurring). Justice O'Connor suggested as an example of such a "basis" the evidence needed to support a prima facie Title VII pattern or practice claim. *Id.* at 292, 106 S.Ct. at 1856.

Wygant, of course, does not directly consider societal discrimination as a legitimate factual predicate for race-based policies adopted by Congress. And the ambiguity of *Fullilove* carries forward to *Croson*. Although the majority nowhere states that Congress has the right to base racially-conscious programs solely on evidence of societal discrimination, neither does it explicitly reject this proposition. See ___ U.S. at ___, 109 S.Ct. at 719 (Part II) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate.").

The Court's recent disposition of *H.K. Porter Co. v. Metropolitan Dade County* indicates that at least some aspects of *Croson* will apply to congressionally authorized racial preferences. The court of appeals had upheld a local racial preference program adopted under the authority of the Surface Transportation Assistance Act of 1978, Pub.L.

No. 95-599, 92 Stat. 2689 (1978), and the Supreme Court remanded "for further consideration in light of" *Croson*. ___ U.S. ___, 109 S.Ct. 1333, ___ L.Ed.2d ___ (1989), vacating 825 F.2d 324 (11th Cir.1987); see also *Croson*, ___ U.S. at ___, 109 S.Ct. at 740 (Marshall, J., dissenting) (commenting that the *Croson* majority opinion represented a "deliberate and giant step" away from *Fullilove*).

The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences. But I pause to note how little there is here. There is no finding by a court or anyone of discrimination in the allocation of broadcasting channels. Nor has any evidence been presented to this court that would amount to prima facie evidence of a discriminatory pattern or practice. See *Wygant*, 476 U.S. at 292-94, 106 S.Ct. at 1856- **[873 F.2d 367]** 57 (O'Connor, J., concurring) (suggesting that such evidence would suffice). Apart from the conclusory references by congressional committees discussed above, there is simply the Commission's observation that only 2.1 percent of radio and TV stations are minority owned and controlled, as against a 23.5 percent minority share of the general population. FCC Brief at 30 n. 33.

Discrepancies between the ethnic proportions among persons receiving a government benefit and among the population at large cannot be evidence of discrimination where special qualifications are needed for receipt of the benefit. See, e.g., *Croson*, ___ U.S. at ___, 109 S.Ct. at 725 ("[w]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.") (citations omitted). Justice O'Connor went on to point out that there was no evidence of the number of minority business enterprises in the relevant market, and indeed noted evidence that black-owned businesses were not homogeneously distributed among industries. *Id.* As the FCC's "integra-

tion" requirements compel the synthesis of ownership and day-to-day management in the same hands, the relevant pool consists of potential owner-managers of radio and TV stations. The figures discussed by the FCC—including those in the CRS Report—nowhere reveal the number or proportion of minorities in this group. In the case at hand, the Rainbow principals are of Hispanic origin, yet we have *no data* on the relative eligibility and participation rates of this group. See *Croson*, ___ U.S. at ___, 109 S.Ct. at 728 (highlighting complete absence of evidence of discrimination against Spanish-speaking and other non-black beneficiaries of Richmond's set-aside program, program's "random inclusion of racial groups that . . . may never have suffered from discrimination in the construction industry," and its "gross overinclusiveness").

Nonetheless, because of the persisting uncertainty over the nature of the discrimination necessary for congressionally mandated remedial preferences, I turn to the issue of whether the preference is "narrowly tailored" or properly "fits" the evil to be cured.

Narrow tailoring. The *Croson* majority took two ameliorating features of the program upheld in *Fullilove* and made their absence critical to the rejection of the Richmond plan. First, in *Fullilove* three justices upholding the preference noted that before adopting the set-asides Congress had considered and attempted alternatives which were not based on racial criteria. See *Fullilove*, 448 U.S. at 463-67, 100 S.Ct. at 2767-69; *id.* at 511, 100 S.Ct. at 2791 (Powell, J., concurring). In *Croson* those justices of the majority whose constitutional views were most tolerant of racial preferences found the Richmond council's failure to consider such alternatives a critical defect. See ___ U.S. at ___, 109 S.Ct. at 728 ("The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE [Minority Business Enterprise] set-aside."). As the Commission adopted the racial preference on the basis of its

and this court's program diversity theory, and as it is most unclear whether Congress has ever endorsed a remedial theory for the program (the point indeed at issue here), it can hardly be said that the program rests on *anyone*'s findings as to the inadequacy of non-race-based alternatives.

Second, the three justices of the *Fullilove* plurality had noted as "significant" that the congressional program at issue provided for waiver of the 10% minority participation requirement "to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination." *Fullilove*, 448 U.S. at 488, 100 S.Ct. at 728. In *Croson*, the majority opinion emphasized the absence of any such built-in limit. "Unlike the program upheld in *Fullilove*, the . . . system focuses solely on the availability of MBEs; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contrac- [873 F.2d 368] tors." *Croson*, ___ U.S. at ___, 109 S.Ct. at 729. This reading of *Fullilove*—whereby the set-aside seemingly applies only to victims of prior discrimination by the agency or industry involved—further undercuts the Commission's claim that its policy is sufficiently narrow in scope.[8] Indeed, it is hard to see how a program can be "narrowly tailored" as a remedy for societal discrimination if competitors have no opportunity to show that individual

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[8] It also sheds light on the question of whether after *Croson* Congress can find remedying general societal discrimination to be a compelling state interest under the Fourteenth Amendment. If the only permissible (narrowly tailored) remedies are those which extend solely to victims of past discrimination perpetrated by the governmental unit or industry at hand, then the only discrimination that even Congress may remedy is discrimination that can be shown to account for the specific beneficiary's plight.

beneficiaries have suffered no impairment of their license-securing ability attributable to that discrimination.

Moreover, in *Croson* (for the first time) the Court made the point that where an agency is making decisions "on a case-by-case basis," it was hard "to see the need for a rigid numerical quota." ___ U.S. at ___, 109 S.Ct. at 730. For such programs, the Court plainly believed, it was practical to ascertain whether discrimination had in fact impaired the proposed beneficiary's competitive position. Although the FCC's preference is not in form a "rigid numerical quota" (a point explored immediately below), the Court's analysis seems equally applicable. Where the government is proceeding on a case-by-case basis, there is no obvious need to employ a mechanical racial preference and forego inquiry into the beneficiaries' actual circumstances. No FCC preference for successful Hispanic entrepreneurs can remedy the years spent by other Hispanics picking lettuce as a result of racial discrimination. At least it cannot if we think of people as individuals.

In upholding the FCC's racial preference policy, *West Michigan* relied heavily on the FCC's treatment of race as merely one of many "factors." 735 F.2d at 613. I am unpersuaded that the multi-factored approach in this case—if that is what it really is—saves the minority preference scheme. As Judge Silberman explained in his opinion in *Shurberg* at ___, "[T]he constitutional distinction between a tolerable and intolerable burden on the innocent turns on the uniqueness and value of the opportunity lost." Here, as in *Shurberg*, Metro was denied a comparative hearing on the only new license currently being offered in the Orlando area. Thus, Rainbow's victory, in which the minority preference was dispositive, deprived the other competitors of their only chance for a new license for the foreseeable future.

Moreover, on the present facts the line between a simple quota and a multi-factored allocation is painfully thin. The

Commission has made clear that it proposes to keep giving race weight until license ownership matches the racial composition of the population at large. See above at 352. That looks like a quota. The only refinement is that the Commission is working to fulfill it gradually—as it must, given the limited number of stations available to allocate each year. The Commission's candid briefing thus appears to remove a distinction that the *West Michigan* court found critical. See *West Michigan*, 735 F.2d at 613.

Even if one assumes, however, along with *West Michigan*, that there are adequate findings of discrimination, that the FCC's minority preference program is genuinely a multi-factored test rather than pursuit of a quota, and that the burden on nonminority applicants is sufficiently light to pass constitutional scrutiny, I believe that the plan is undermined by the two defects that *Croson* made critical—the absence of consideration of alternative nonracial solutions and the omission of a waiver provision that effectively confines the benefits to individuals who have suffered identifiable discrimination.

It is plain that the FCC has not offered a remedial rationale for its policy. Nor could it possibly be said that the appropriations acts clearly establish a remedial policy, in light of the textual ambiguity concerning the word "policy" in the appropriations [**873 F.2d 369**] acts, their legislative histories, and the strong possibility that even supported as a remedy the FCC's racial preference program would violate the equal protection clause. Whether we could uphold a Commission finding that the acts established such a policy, given the deference it enjoys in matters of law under *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984), is not before us, in the absence of any FCC consideration of the point. See *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1172 (D.C.Cir.1986) (deference must be based on agency's exercise of its interpretive judgment).

CONCLUSION

Finding the program diversity theory unconstitutional because plainly based on impermissible racial stereotypes, and finding no adoption of any remedial justification by the Commission or Congress, I would remand to the Commission for further proceedings. The FCC's first task on remand would be to interpret the relevant appropriations act for 1989 to determine whether it mandates a remedial preference policy. If the FCC determines that it does not, it would be free to reassess the preference policy in light of the unconstitutionality of the program diversity rationale.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 85-1755

Winter Park Communications,

Appellant

v.

Federal Communications Commission,

Appellee

Rainbow Broadcasting Company,
Metro Broadcasting, Inc.,
Winter Park Chamber of Commerce,
City of Winter Park,

Intervenors

and consolidated case No. 85-1756

[Filed Apr. 21, 1989]

ORDER

It is ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

Constance L. Dupre
Clerk

APPENDIX B

[3 FCC Rcd 866]

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

METRO BROADCASTING, INC. Orlando, Florida	MM DOCKET NO. 83-140 File No. BPCT-820707KE
RAINBOW BROADCASTING COMPANY Orlando, Florida	MM DOCKET NO. 83-142 File No. BPCT-820909KF
WINTER PARK COMMUNICATIONS, INC. Winter Park, Florida	MM DOCKET NO. 83-143 File No. BPCT-820909KV

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1988; Released: February 23, 1988

By the Commission:

1. This proceeding involves mutually exclusive applications for a new UHF television station on Channel 65 at Orlando/Winter Park, Florida. In an order released October 18, 1985, the Commission upheld a Review Board decision granting the application of Rainbow Broadcasting Company (Rainbow) and denying the applications of Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park). *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984), *rev. denied*, FCC 85-558, released October 18, 1985.

2. Metro and Winter Park filed appeals from the Commission's decision with the Court of Appeals for the District of Columbia Circuit. *Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C. Cir.) and consolidated case. One issue raised on appeal was whether the Commission properly evaluated the applicants under the "integration of ownership and management" criterion, which included an award of a slight gender preference and substantial minority preference to Rainbow, the winning applicant.

3. In a 1985 decision, a divided three-judge panel of the Court of Appeals held that the Commission's policy applying a gender preference in comparative licensing proceedings was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated*, October 31, 1985, *remanded*, October 9, 1986. The Court *en banc* vacated the panel opinion and ordered rehearing. Subsequently, the court granted the Commission's motion to remand the case in order to permit the agency to reexamine the bases for its minority and female preference policies. On remand, the Commission initiated a notice of inquiry proceeding to consider these questions. *See Race and Gender Preferences*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484), modified, 2 FCC Rcd 2377 (1987). In that notice, the Commission stated that it would hold in abeyance, pending the conclusion of its inquiry, all cases in which a preference would be dispositive.

4. In light of the remand in the *Steele* case, the Commission sought a remand of the record in the instant proceeding to determine whether the minority preference it had awarded to Rainbow was of decisional significance.[1]

[1] The Commission already had determined in its October 1985 *Order*

The Court granted the Commission's Motion for Remand and a related motion by Metro on November 5, 1986. On remand, the Commission concluded that deletion of Rainbow's minority and female preferences could reverse the outcome of this proceeding and result in an award to Metro. Accordingly, the Commission ordered this proceeding held in abeyance pending further action pursuant to the Commission's consideration of MM Docket No. 86-484. *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987).

5. On December 22, 1987, the President signed into law House Joint Resolution 395 which contained the appropriations legislation for the Commission for fiscal year 1988.[2] This legislation appropriated money for Commission salaries and expenses with the following pertinent proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, *as amended*, 52 R.R. 2d 1313 (1982) [sic][3] and *Mid-Florida Television Corp.*, 60 F.C.C.2d 607 Rev. Bd. (1978) [sic],[4] which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

that even if no consideration were given to Rainbow's 5% female participation, it would not change the outcome of this proceeding. *Metro Broadcasting, Inc.*, FCC 85-558, 6 20. Therefore, only the minority preference was potentially dispositive.

[2] *Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-202 (signed Dec. 22, 1987).

[3] 52 RR 2d 1301 (1982).

[4] 69 FCC 2d 607 (Rev. Bd. 1978).

6. In compliance with this legislation, the Commission has ordered MM Docket No. 86-484 closed, thereby terminating the reexamination of its comparative licensing policies based on racial, ethnic or gender preferences. *Order*, FCC 88-17, adopted January 14, 1988. In order to comply with the legislation fully, the Commission also ordered that its comparative licensing policies based on racial, ethnic or gender preferences that were in effect prior to September 12, 1986, be reinstated and that the presiding Administrative Law Judges, the Review Board and the Office of the General Counsel process all comparative licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986. *Id.*

7. ACCORDINGLY, IT IS ORDERED, that in view of the termination of MM Docket No. 86-484 and the Commission's reinstatement of its comparative preference policy, the instant proceeding IS REACTIVATED and the Commission's *Order*, FCC 85-558, upholding the Review Board decision granting Rainbow Broadcasting Company's application IS REAFFIRMED, in compliance with the legislative directive set forth in House Joint Resolution 395, Pub. L. No. 100-202. [3 **FCC Rcd 867**]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

[2 FCC Rcd 1474]

In re Applications of

METRO BROADCASTING, INC. Orlando, Florida	MM DOCKET NO. 83-140 File No. BPCT-820707KE
RAINBOW BROADCASTING COMPANY Orlando, Florida	MM DOCKET NO. 83-142 File No. BPCT-820909KF
WINTER PARK COMMUNICATIONS, INC. Winter Park, Florida	MM DOCKET NO. 83-143 File No. BPCT-820909KV

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1987; Released: March 9, 1987

By the Commission:

1. Before the Commission are: (1) the above-captioned applications remanded by the United States Court of Appeals for the District of Columbia Circuit. (2) Comments filed November 17, 1986 by Winter Park Communications, Inc. (Winter Park) and November 18 by Metro Broadcasting, Inc. (Metro) and Rainbow Broadcasting Company (Rainbow), and (3) Reply Comments filed December 1 by Winter Park, Metro, and Rainbow.

I. BACKGROUND

2. Metro, Rainbow, and Winter Park are mutually exclusive applicants for a new UHF television station on Channel 65 at Orlando/Winter Park, Florida. On October 18, 1985, the Commission upheld a Review Board Decision granting Rainbow's application and denying the applications of Metro and Winter Park. *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984), *rev. denied*, FCC 85-558, released October 18, 1985.

3. The comparative analysis of the applicants, none of which had any other media interests, turned on their respective proposals to integrate ownership into management. Winter Park, which proposed no full time integration was far inferior to the other two applicants. On the other hand, Rainbow received quantitative credit for 90% full time integration, whereas Metro was credited quantitatively with 79.2% full time and 19.8% part time integration. Qualitatively, Rainbow also was given a substantial preference for minority ownership participation (90% vs. 19.8%) and a very slight preference for female ownership participation (5% vs. 0%). Additionally, Rainbow received a solid preference for broadcast experience, because the experience of Rainbow's 85% owner was judged far more extensive than the relatively minor experience of two of Metro's owners, each holding a 19.8% interest. The Board did, however, award Metro a moderate preference based on the local residence and civic activities of 99% of its ownership. In reaching its Decision, the Board stated:

> . . . [W]hile [Rainbow's] 10.8% advantage [in full time integration] is probably a "clear" enough difference to be decisional . . . we conclude that it is also ahead qualitatively . . . [B]ased on its quantitative and qualitative edge, we award Rainbow a slight overall integration preference over Metro.[1]

[1] 99 FCC 2d at 703-04. In denying review, the Commission held that

4. After the Commission upheld the Board's Decision, Metro and Winter Park, the two losing applicants, filed appeals. *Winter Park Communications, Inc. v. FCC,* No. 85-1755 (D.C. Cir.) and consolidated case. A panel of the Court of Appeals for the D.C. Circuit held that the Commission lacked statutory authority for its female preference policy. *Steele v. FCC,* 770 F.2d 1192 (D.C. Cir. 1985). Subsequently, on October 3, 1985, the full court vacated that decision and, on October 9, 1986, granted the Commission's motion for remand to permit it to consider questions concerning the constitutional and statutory authority for awarding comparative preferences based on race and gender.[2] Subsequently, the Commission initiated a separate nonadjudicatory proceeding to explore these questions. *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications,* 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484). Therein, the Commission determined that it would defer action on cases in which racial, ethnic, or gender preferences were found to be dispositive pending final resolution of that proceeding.

5. The Commission sought remand of the instant case to determine whether the minority and female preferences awarded Rainbow are of decisional significance. The court granted the Commission's Motion for Remand and a related Motion by Metro on November 5, 1986. The Commission thereupon sought comments from the parties. FCC 861-136, released November 7, 1986.

Rainbow would have an advantage over Metro even if Metro's local residence preference were considered substantial.

[2] When the gender preference was first announced by the Commission's Review Board in 1978, it was explained that the female preference was adopted "upon essentially the same basis as the merit given for black ownership and participation." *Mid-Florida Television Corp.,* 69 FCC 2d 607, 652 (Rev. Bd. 1978); *Steele v. FCC,* 770 F.2d at 1200-12 (Wald, J., dissenting). The Commission's analytical concerns about the constitutional validity of both minority anershid gender preferences were identical. For this reason, as well as the fact that the gender preference policy was an outgrowth of the minority preference policy, the Commission sought a remand that would enable it to address both issues in a comprehensive manner.

II. THE PARTIES' COMMENTS[3]

6. Rainbow argues that even without preferences for minority and female integration it is quantitatively and qualitatively superior to Metro. It points out that *New Continental Broadcasting Co.,* 88 FCC 2d 830, 850 (Rev. Bd. 1981), *remanded on other grounds,* 93 FCC 2d 1275 (1983), held that a 12.5% advantage in full time quantitative integration was "clear" and thus sufficient to outweigh qualitative integration differences.[4] According to Rainbow, its 10.8% advantage should be similarly decisive. As to qualitative differences, Rainbow maintains that its substantial advantage for broadcast experience and the assertedly strong local ties of its owners outweigh Metro's local residence and civic participation credit.

7. Metro contends that there is no significant difference in quantitative integration between it and Rainbow and that, in the absence of Rainbow's minority and female preferences, Metro's local residence advantage is decisive. Metro urges the Commission not to follow *New Continental* and also asserts that its 19.8% part time integration should [**2 FCC Rcd 1475**] be given substantial weight here. Qualitatively, Metro argues that Rainbow's broadcast experience and credit for Rainbow's 5% owner deserve little weight.

[3] Winter Park argues that it should prevail or grounds not relevant to the instant remand.

[4] In that case, an applicant with 65% full time integration prevailed over an applicant with 52.5% full time and 37.5% part time integration (20 hours per week). Contrary to Metro's contention *New Continental* does not rely crucially on *Massillon Broadcasting Co., Inc.,* 36 FCC 809 (1964), a case superseded in pertinent respects by the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965).

III. ANALYSIS

8. We agree with Metro that on the facts of this case Rainbow's minority and female preferences appear to be decisionally significant. Accordingly, we will hold this case in abeyance.

9. We conclude that quantitative integration might not be considered dispositive in this case. In previously upholding the Board's Decision, we had no occasion to rule on the Board's observation that Rainbow's quantitative advantage was "probably" clear. Now, however, that question becomes crucial. We decline to extend *New Continental* to the facts of this case. In this regard, careful consideration must be given to the nature of Metro's part time integration of its 19.8% principal Arthur Grindle. Unlike the usual case of part time integration, Grindle would be integrated for most of the year as Metro's full time general manager, except for the two months when he would be in Tallahassee as a member of the Florida House of Representatives. 99 FCC 2d at 701. Rainbow's quantitative advantage over Metro is narrow in any case, and Grindle's integration, even accepting the Board's characterization as "part time," significantly undermines that advantage. Thus, we are not persuaded at this time that sufficient grounds exist to decide this case on the quantitative aspects of the applicants' integration proposals.

10. Because it now appears that Rainbow has no clear quantitative advantage over Metro, we turn now to qualitative factors. *See Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 495, *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984), *modified*, 58 RR 2d 439 (1985). We find that absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro. Rainbow's advantage for broadcast experience, although substantial, would not equal Metro's advantage for local residence and civic participation, since we have characterized broadcast experience as having minor significance in comparison with

the latter factors. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). In finding that Metro has a moderate substantial preference over Rainbow for local residence/civic participation, we have already taken into account the slight credit due Rainbow because its 5% owner Esperanza Rey-Mehr is a local resident and its 85% owner Joseph Rey has promised future local residence. 97 FCC 2d at 704. No further credit is warranted.

11. In view of the foregoing, we conclude that deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to Metro. We will therefore hold this case in abeyance pending our consideration of MM Docket No. 86-484.

12. ACCORDINGLY, IT IS ORDERED, That this proceeding IS HELD IN ABEYANCE pending further action pursuant to our consideration of MM Docket No. 86-484 and subject to any further instructions from the United States Court of Appeals for the District of Columbia Circuit.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1755

Winter Park Communications,

Appellant

v.

Federal Communications Commission,

Appellee

Rainbow Broadcasting Company
Metro Broadcasting, Inc.,
Winter Park Chamber of Commerce,
City of Winter Park,

Intervenors

[FILED NOV 5 1986]

Before: Mikva, Ginsburg and Silberman, Circuit Judges

ORDER

Upon consideration of the motions of intervenor Metro Broadcasting, Inc. and respondent for remand, of the opposition thereto, and of the motion of intervenor Rainbow Broadcasting Company to strike, and of the opposition and replies thereto, it is

ORDERED, by the Court, that ruling on intervenor's aforesaid motion to strike is deferred pending the oral argument of the above entitled cases. And, it is

FURTHER ORDERED, by the Court, that the aforesaid motions to remand are granted and the record in the above

entitled cases is hereby remanded to the Federal Communications Commission as set forth in the aforesaid motions. The parties are directed to file status reports at forty-five day intervals beginning December 22, 1986.

Per Curiam

FOR THE COURT:
George A. Fisher, Clerk

By: /s/ Patricia L. Chatman
Patricia L. Chatman
Deputy Clerk

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

METRO BROADCASTING, INC. Orlando, Florida	MM DOCKET NO. 83-140 File No. BPCT-820707KE
RAINBOW BROADCASTING COMPANY Orlando, Florida	MM DOCKET NO. 83-142 File No. BPCT-820909KF
WINTER PARK COMMUNICATIONS Winter Park, Florida	MM DOCKET NO. 83-143 File No. BPCT-820909KV

For Construction Permit

ORDER

Adopted: October 11, 1985; Released: October 18, 1985

By the Commission:

1. The Commission has before it: (1) Applications for Review filed January 16, 1985 by Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park);[1] (2) Oppositions to the respective Applications for Review filed February 5 by Rainbow Broadcasting Company (Rainbow),[2] an Opposition to Winter Park's Application for Review filed February 5 by Metro, and Comments on Metro's Application for Review filed February 5 by Winter Park; (3) a Motion for Leave to Exceed

[1] Winter Park filed an Erratum January 18.

[2] Rainbow filed Errata on February 19.

Page Limitation filed January 16 by Metro,[3] Oppositions thereto filed January 23 by Winter Park and January 25 by Rainbow, and a Reply filed January 29 by Metro; (4) Motions to Strike [portions of Rainbow's Oppositions to the Applications for Review] filed February 14 by Metro and February 15 by Winter Park and an Opposition thereto filed February 26 by Rainbow; and (5) a Motion for Leave to File Supplement to Application for Review, and a Supplement to Application for Review, filed August 29 by Metro and an Opposition thereto filed September 10 by Rainbow. These pleadings relate to a Decision of the Review Board granting Rainbow's application for a new UHF television station on Channel 65 at Orlando, Florida and denying the applications of Metro and Winter Park.[4]

2. We agree with the Board's resolution of this case. However, we wish to comment on one matter. The Board found that Rainbow's proposal for integration of ownership into management was superior to Metro's. In the Board's view, Rainbow has a clear edge in quantitative integration and its qualitative advantages for minority participation, female participation, and broadcast experience outweigh Metro's advantages in local residence and civic participation. Metro challenges the Board's award of "moderate" rather than "substantial" credit for its local residence. We believe that on the facts before us, even if Metro's local residence credit were increased in the manner suggested and no consideration were given to Rainbow's 5% female participation,[5] it would not change the outcome of this case.

[3] In addition to a 10 page Application for Review filed in accordance with our Rules, Metro has attached a 23 page Application for Review to its Motion for Leave to Exceed Page Limitation.

[4] *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984).

[5] In this regard, we note that the practice of giving credit for female participation was set aside by *Steele v. FCC*, No. 84-1176 (D.C. Cir. August 23, 1985).

3. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Exceed Page Limitation filed January 16, 1985 by Metro Broadcasting, Inc., IS DENIED and the attached 23 page Application for Review IS DISMISSED.[6]

4. IT IS FURTHER ORDERED, That the Motions to Strike filed February 14, 1985 by Metro Broadcasting, Inc. and February 15, 1985 by Winter Park Communications, Inc. ARE GRANTED and those portions of the Oppositions to Applications for Review filed by Rainbow Broadcasting Company which raise new arguments ARE STRICKEN.[7]

5. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplement to Application for Review and Supplement to Application for Review filed August 29, 1985 by Metro Broadcasting, Inc. ARE DISMISSED as moot in light of paragraph 2 *supra*.

6. IT IS FURTHER ORDERED, That pursuant to Section 1.115(g) of the Rule the Applications for Review filed January 16, 1985 by Metro Broadcasting, Inc. and Winter Park Communications, Inc. ARE DENIED.[8]

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[6] Metro has not shown that this case is one of unusual complexity.

[7] It is inappropriate to raise new issues in an opposition to an application for review. Such practice tends to undermine the specified pleading schedule and deprive the other parties of a opportunity to respond. *Cf. Newhouse Broadcasting Corp.*, 61 FCC 2d 528, 529 (1976), *recon. granted in part*, 73 FCC 2d 186 (1979). If Rainbow wished to challenge the Board's Decision in any respect, it should have filed an Application for Review or Contingent Application for Review.

[8] One additional matter requires mention although it does not affect the outcome of the case in light of Rainbow's other advantages. The Review Board awarded Metro and Rainbow preferences for proposing auxiliary power. Such preferences are not authorized in television proceedings. *See Minority Broadcasters of East St. Louis Inc.*, 57 RR 2d 1390 (1985), *appeal docketed sub nom. Spectrum Telecommunications Corp. v. FCC*, No. 85-1249 (D.C. Cir. April 15, 1985).

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554[99 FCC 2d 688]

In re Applications of

Metro Broadcasting, Inc. Orlando, Florida	MM Docket No. 83-140 File No. BPCT-820707KE
Rainbow Broadcasting Company Orlando, Florida	MM Docket No. 83-142 File No. BPCT-820909KF
Winter Park Communications Winter Park, Florida	MM Docket No. 83-143 File No. BPCT-820909KV

For Construction Permit

Appearances

John H. Midlen, Jr., on behalf of Metro Broadcasting, Inc.; *Barry D. Wood, Richard E. Wiley, John C. Quale, Antoinette D. Cook*, and *Jerry V. Haines*, on behalf of Rainbow Broadcasting Company, and *Robert J. Buenzle*, on behalf of Winter Park Communications.

[99 FCC 2d 689]
DECISION

Adopted: November 23, 1984 Released: December 3, 1984.
BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL CONCURRING DUBITANTE AND ISSUING A SEPARATE STATEMENT.

BOARD MEMBER JACOBS:

1. This proceeding involves the mutually exclusive applications of Metro Broadcasting, Inc. (Metro), Rainbow Broadcasting Company (Rainbow), and Winter Park Communications (Winter Park) for authority to construct a new television broadcast station to operate on Channel 65. Metro and Rainbow propose Orlando, Florida as their community of license; Winter Park proposes the adjacent community of Winter Park. By Hearing Designation Order, 48 Fed. Reg. 10917, published March 15, 1983, these applications were designated for consolidated hearing to determine which proposal would best provide a fair, efficient, and equitable distribution of broadcast service pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), and on a contingent comparative issue.[1] By *Memorandum Opinion and Order*, FCC 83M-2102, released June 27, 1983, presiding Administra-

[1] In addition, the application of Harry D. Calhoun et al. d/b/a Orlando Family Television, Ltd. (File No. BPCT-820907KK) was designated for hearing. Subsequently, this application was dismissed by the ALJ, I.D., note 1. By *Memorandum Opinion and Order*, FCC 84R-5, 55 RR 2d 290 (Rev. Bd. 1984), released after the Initial Decision, we granted Orlando Family Television's appeal from its dismissal but remanded the proceeding to the ALJ to determine whether its application conformed with the multiple ownership rules. However, the ALJ subsequently dismissed with prejudice Orlando Family Television's application at its own request and reinstated the Initial Decision. *Memorandum Opinion and Order*, FCC 84M-2345, released May 17, 1984.

tive Law Judge Walter C. Miller (ALJ) added a misrepresentation/lack of candor issue against Rainbow.

2. The Initial Decision (I.D.), FCC 83D-69,90 FCC 2d 1073, released 12-21-83, disqualified Rainbow for misrepresenting decisionally significant facts in the ownership integration proposal it submitted on April 1, 1983, found no Section 307(b) preference to be warranted under the facts of this case, and granted Metro's application after concluding that it was an "overwhelming comparative winner" over Winter Park because of its "clear and decisive" integration preference and its "substantial" comparative engineering coverage preference.

3. The proceeding is now before the Review Board on exceptions filed by all of the applicants. The Board has reviewed the I.D. in light of the [**99 FCC 2d 690**] exceptions and reply briefs, the oral argument held September 26, 1984, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein. Because we disagree with the I.D.'s disqualification of Rainbow and find Rainbow to be comparatively the best applicant, we reverse the I.D. and grant Rainbow's application.

4. *Misrepresentation.* The ALJ disqualified Rainbow for misrepresentation based on his finding that it failed to indicate in its April 1, 1982 integration showing submitted to the ALJ that the participation of Leticia Jaramillo (a 10% partner) as proposed full-time program manager was secondary to her inconsistent proposal made in another proceeding to serve as full-time general manager of a station at Sacramento, California. I.D., Findings, paras. 5-18; Conclusions, paras. 2-7. In its exceptions, Rainbow urges the Board to overturn its disqualification because its April 1, 1983 integration proposal was accurate when made and at the time of the hearing, and remains unchanged today. Only during a brief period after the proposal was submitted to the ALJ on April 1, and before the commencement of the hearing on August 22, according to Rainbow, did it consider Jaramillo's Orlando integration proposal to be contingent upon her Sacramento proposal. Also, Rainbow points out that on April 28, the date it filed its integration proposal in the Sacramento proceeding, it filed a petition for leave to amend in the instant case which revealed its contingent Sacramento integration plans. Metro and Winter Park reply that Rainbow's disclosure of its intentions concerning the Sacramento proposal was belated and incomplete and that Rainbow lacked candor when it omitted from its April 1 submission in this proceeding any reference to its inconsistent intentions to be integrated at the Sacramento station.

5. A chronological review of the key facts is enlightening. In its application as originally filed on September 9, 1982, Rainbow disclosed that its principals Joseph Rey (85% owner) and Leticia Jaramillo (10%) also were 10% and 90% owners, respectively, of El Dorado Television Company (El Dorado), which on August 24, 1982 had filed a television broadcast application for a new station at Sacramento, California. Rainbow FCC Form 301, Exh 1 (official notice taken). On November 5, 1982, Rainbow amended its Orlando application to state that its principals "plan to be actively involved in the management of the [Orlando] station on a day-to-day basis." The Sacramento and Orlando proceedings were designated for hearing on February 22 and March 15, 1983, respectively. By *Order Prior to Prehearing Conference*, FCC 83M-940, released March 22, 1983, the ALJ directed each party to the Orlando proceeding to submit within 10 days a written integration proposal. Rainbow's response on April 1, 1983 indicated that each of its principals would be integrated fulltime (40 hours per [**99 FCC 2d 691**] week) into station management roles: Rey as general manager, Jaramillo as program manager, and Esperanza Rey-Mehr (5% owner) as director of Hispanic affairs. Winter Park Special Issue Exh. 3.

6. However, on April 28, 1983, El Dorado responded to a similar order of the presiding officer in the Sacramento proceeding by filing an integration statement that referenced the Orlando integration proposal and committed Rey and Jaramillo to be full-time integrated principals at Sacramento if Rainbow's application were unsuccessful. I.D., Findings, para. 16; Winter Park Special Issue Exh. 1. It further stated that, although Rey's Orlando integration commitment was to "take precedence" over his Sacramento proposal, Jaramillo's commitment to Orlando was secondary to her promise to serve as full-time general manager of the proposed Sacramento station. *Id.* In this latter respect, El Dorado stated:

> [S]hould the Orlando application be granted prior to, or within three years following the initiation of the operation of the Sacramento station. Ms. Jaramillo will transfer her interest in Rainbow Broadcasting Company to Joseph Rey, and will have no mangement role at the Orlando facility.

Id. (In addition, Rey would divest his interest in El Dorado upon grant of a construction permit for the proposed Orlando station. *Id.*) Also on April 28, Rainbow filed a petition for leave to amend which, in addition to reflecting a change of address for Ms. Jaramillo, clarified its Orlando integration proposal:

> The Rainbow application reflects that its partners, Leticia Jaramillo and Joseph Rey, are also partners in El Dorado Television Company, which is one of ten applicants for a construction permit on Channel 29 in Sacramento, California. El Dorado is now engaged in settlement negotiations in which it has offered to dismiss its application in exchange for reimbursement of its prosecutorial expenses. However, if those negotiations fail and the El Dorado application is eventually granted, Ms. Jaramillo will serve as the fulltime general manager of the Sacramento station, and will

> transfer her interest in Rainbow Broadcasting Company to Joseph Rey. In that event, she will terminate her integration commitment with respect to the Orlando station. Mr. Rey has also proposed to serve in a fulltime management role at the Sacramento station, but only to the extent that such involvement would not interfere with his commitment to serve as the fulltime general manager of the Orlando station. In the unlikely event that both applications are granted, Mr. Rey will divest his interest in El Dorado Television Company. El Dorado's Statement for the Record on these matters is being exchanged today in the Sacramento proceeding.

Winter Park Special Exh. 2; Tr. 691-694. The ALJ granted the petition only insofar as it reported the address change, but denied Rainbow's attempt to clarify its integration proposal. *Order*, FCC 83M-1648, released May 18, 1983. Subsequently, he granted a motion to enlarge issues filed May 16, 1983 by Winter Park and added an issue to determine whether Rainbow's April 1, 1983 integration proposal contained misrepresentations or was lacking in candor. FCC 83M-2102, *supra*.

7. At hearing, Rainbow principals Rey and Jaramillo were examined extensively with respect to both the omission from the April 1, 1983 [**99 FCC 2d 692**] integration statement of any reference to their plans to personally manage the Sacramento station and their failure to disclose that, if the Rainbow application were granted within three years after initiation of operation of the Sacramento station, Ms. Jaramillo then would transfer her Rainbow ownership interest to Rey and would abandon the proposed Orlando station. See Tr. 650-888. They explained that in applying for the Sacramento and Orlando construction permits they were seeking ultimately to obtain one station at which they both could work together. Tr. 695-97, 760-61, 853, 877-78. A few days after filing the Sacramento ap-

plication on August 24, 1982, they realized that a total of twelve applicants were vying for that one station and, consequently, their chances in a comparative hearing were slim. Tr. 696, 704, 761-62, 852-53. The Orlando application was then filed on September 9. In February 1983, after their engineering consultant informed them that the Sacramento application had a transmitter site problem, each of them believed that that application would most likely be dismissed through settlement at some future time and they focused their attentions on their Orlando application. Tr. 728-33, 801-02, 852-53. In response to the ALJ's March 22, 1983 Orlando order requiring a written submission of their integration plan, FCC 83M-940, *supra*, Rey engaged in "frantic" phone calls with counsel and his partners and formulated the integration proposal, involving full-time participation by all three principals, that was submitted April 1, 1983. Tr. 674, 778-82, 873-74. The Sacramento proceeding was not discussed during these telephone conversations and was not on Rey's and Jaramillo's minds at this time since they still assumed that the Sacramento application would shortly be dismissed through settlement. Tr. 727-28, 735, 781-83, 866.

8. Although the Sacramento presiding officer had ruled on April 15, 1983 that a written integration plan had to be filed by April 28, Rey first became aware of this fact on April 27. Rey was unable to reach Jaramillo and developed by himself the proposal that was submitted on April 28 and which he regarded as a "hypothetical" or "academic exercise" because he believed that the Sacramento application would soon be dismissed. Tr. 675-77, 782-91, 808, 812-13, 850-51, 869. Both Rey and Jaramillo were proposed for full-time management roles at the Sacramento station, but Rey's participation was made secondary to his Orlando integration promise. See para. 6, *supra*. However, Jaramillo's Sacramento participation proposal was given priority over her Orlando plan in the event that the Sacramento application were granted. *Id.* Rey

subsequently spoke with Jaramillo who orally ratified this integration plan, but who also believed the Sacramento submission to be "hypothetical" because negotiations were underway to achieve a settlement and dismissal of the application. Tr. 677-78, 700-04, 736-40, 746, 800. The condition that Jaramillo would abandon the Orlando [**99 FCC 2d 693**] station should that application be granted "within three years following the initiation of the operation of the Sacramento station" was apparently inserted on advice of counsel to avoid a potential "trafficking" violation[2] and was regarded by Rey as a "legal technicality" that he did not understand. Tr. 794-96, 805-07. Also, in his April 27 conversation with counsel, Rey suggested that the ALJ in the Orlando proceeding be informed of the Sacramento submission, and counsel proposed that the information be supplied with the change of address amendment he was going to file the next day. Tr. 789, 876-77. This was done—the ALJ and the other parties were informed of Jaramillo's formal primary integration pledge to Sacramento—but the three-year contingency was inexplicably omitted. See para. 6, *supra*. In their direct written testimony, notarized on July 27 and 28, 1983, respectively, Rey and Jaramillo did not indicate that their proposals to participate fulltime in Rainbow's station management were in any manner contingent upon the outcome of the Sacramento proceeding. Rainbow Exhs. 1, 2, 4. However, they testified that in

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[2] Section 73.3597(a) through (d) of the Rules, 47 CFR 73.3597(a)-(d), formerly comprised the "three-year rule" which required an application for broadcast license assignment or transfer submitted prior to completion of a three-year holding period to be designated for hearing unless specified extenuating circumstances were present or a waiver petition was found to be meritorious. *Transfer of Broadcast Facilities*, 52 RR 2d 1081, 1082 (1982). However, effective December 14, 1982, this rule, and its underlying policy against "trafficking" in broadcast licenses, was eliminated by the Commission and in its place a one-year holding period after commencement of operation was imposed on those who obtain a permit as a result of a grant through comparative hearing. *Id.* at 1086, 1089; 47 Fed. Reg. 55924.

preparing these exhibits they regarded the Sacramento application as dismissed because a settlement agreement had been reached in June and revised slightly and reexecuted in July. Tr. 754-55, 843-45. The settlement agreement was filed in the Sacramento proceeding on July 29, 1983, and shortly thereafter the presiding officer formally approved the agreement and dismissed the El Dorado application. *Trefoil Broadcasting Co., Inc.*, FCC 83M-2657, released August 11, 1983.

9. Based on the preceding review of the record evidence, we hold that the ALJ erred in disqualifying Rainbow. A finding of disqualifying misrepresentation or lack of candor requires evidence of a willful intent to deceive, mislead, or conceal. *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137, 50 RR 2d 1321, 1325 (Rev. Bd. 1982), *modified*, 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (Comm'n 1983). *See also Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 723, 54 RR 2d 989, 996 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551, 55 RR 2d 424 (Rev. Bd. 1984); *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1177, 49 RR 2d 1001, 1005 (Rev. Bd.), *modified on other grounds*, 88 FCC 2d 620, 50 RR 2d 802 (Comm'n 1981). We find no evidence of such wrongful intent here. In departing from the [**99 FCC 2d 694**] ALJ's determination that Rainbow principals Rey and Jaramillo intentionally misrepresented Jaramillo's management role and concealed their inconsistent Sacramento integration proposal (I.D., Findings, paras. 9, 18, and note 7; Conclusions, paras. 6-8 and note 18), we are not unmindful that the Commission is "generally reluctant to overturn the credibility determinations of an ALJ unless his findings are patently in conflict with the record evidence." *Country Broadcasting Company*, 93 FCC 2d 83, 88, 53 RR 2d 293, 297 (Rev. Bd. 1983); *accord, Old Time Religion Hour, supra*, 95 FCC 2d at 722, 54 RR 2d at 996. Here, however, the ALJ has made no adverse demeanor findings and has not found the testimony of Rey or Jaramillo to lack credibility; without any solid

evidentiary support for his conclusions he has, we believe, mischaracterized the import of their testimony and drawn erroneous inferences of fact.

10. Thus, for instance, we cannot uphold the ALJ's determination (I.D., Findings, para. 18) that

> Rey and Jaramillo took the position that the misrepresentation was made to Judge Kuhlmann [the Sacramento presiding officer] and not to the Orlando Presiding Officer, but that it was all right to be less than candid with Judge Kuhlmann, since they intended to dismiss the Sacramento application in any event.

We can find no record support for this conclusion, and we believe it mischaracterizes their record testimony that they viewed their Sacramento integration proposal as "hypothetical" (because they were negotiating a settlement agreement which would result in the dismissal of the Sacramento application) but would nevertheless implement that integration proposal in the unlikely event that the application were granted. See para. 8, *supra*. Contrary to the ALJ's implication, there is no evidence to suggest that El Dorado would not have carried out its integration commitment had its application not been dismissed.[3] Other findings by the ALJ in like vein, *e.g.*, that Mr. Rey was "well aware that he has been less than candid with the Commission" (I.D., n. 7), that "Mrs. Jaramillo misrepresent[ed her] role . . . in Rainbow" (I.D., note 18), and that

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[3] In addition, the ALJ's finding (I.D., Findings, para. 9) that Rey and Jaramillo knew at the time they filed Rainbow's application on September 9, 1982 that they would have to file an integration proposal in each market is not supported by Rey's testimony at Tr. 673, upon which it is purportedly based. Instead, the totality of the testimony reveals their state of mind on the date in question to be primarily focused on prosecuting Rainbow's Orlando proposal because they viewed the El Dorado Sacramento application as having only a remote chance of being granted. See para. 7, *supra*.

Rainbow "dissembled" (I.D., Cncls., para. 6) and "misrepresented" (*id.*, para. 7) are also entirely conclusory and simply lack factual support.[4] We [**99 FCC 2d 695**] are therefore obliged to perform "our statutory duty to act in the public interest" by rejecting these findings which are "patently in conflict" with the record evidence. *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1045, 24 RR 2d 369, 381 (1972); *see Lorain Journal Co. v. FCC*, 351 F. 2d 824, 828 (D.C. Cir. 1965).

11. Instead, we find that the uncontroverted record evidence (see paras. 5-8, *supra*) shows a complete absence of any intent by Rainbow or its principals to conceal their ownership integration plans or to deceive or mislead the Commission in this regard. Any potential motive to conceal its principals' Sacramento plans in order to achieve some tactical advantage at the Orlando hearing is not supported by even one evidentiary shred. Through 238 pages of hearing testimony (Tr. 650-888), Rey and Jaramillo adhered consistently to their explanation that the April 1, 1983 Orlando integration pledge was submitted to the ALJ without any thought of filing an intentionally inconsistent proposal in Sacramento, which they considered largely hypothetical in any event because of the expected settlement; and, on April 28, when Rey filed the Sacramento plan which modified the Orlando submission, Rainbow immediately informed the Orlando ALJ of that modification as well as of the specifics and basic contingencies per-

[4] We also note the ALJ's findings that "no legal partnership" was ever formed for El Dorado and was not formed for Rainbow until the hearing was underway, I.D., nn. 4 and 5. These findings are without any decisional importance because they neither support the ALJ's lack of candor conclusions nor reveal any legal defect in the applicant Rainbow. *Cf. High Sierra Broadcasting, Inc.*, 56 RR 2d 1394, 1396 (Comm'n 1984). Indeed, no issue pertaining to legal qualifications was specified with regard to either the El Dorado or Rainbow application.

taining to both proposals.[5] Also, Rainbow's omission in its April 28 statement of the three-year Jaramillo contingency plan appears inadvertent and unintentional, particularly since her contingent commitment to Sacramento was spelled out otherwise.[6] In these circumstances, no more than a slight comparative demerit against Rainbow could possibly be warranted—and then only for its principals' carelessness or inattentiveness in not realizing earlier, *i.e.*, at the time they submitted their April 1, 1983 integration plan, the need to delineate their Sacramento proposal which, when finally put together and submitted, contained contingencies and weakened their Orlando proposal. *See Merrimack Valley Broadcasting, Inc.*, FCC 84-496, released October 23, 1984, at note 9; *compare Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 947, 50 RR 2d 1142, 1145 (Rev. Bd. 1982) (no demerit assigned for an inadvertent [**99 FCC 2d 696**] omission of a decisionally insignificant matter) *and Town and Country Radio, Inc.*, 70 FCC 2d 572, 575-6, 44 RR 2d 149, 153-54 (Rev. Bd. 1978) (minor demerit for unintentional but careless reporting violations) *with Radio Station WABZ, Inc.*, 90 FCC 2d 818, 827, 51 RR 2d 1507, 1515 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 722 F. 2d 756 (D.C. Cir. 1983) (moderate demerit for numerous reporting violations reflecting "an inattention to . . . reporting requirements"). However, as we recently discussed in *The Gene Sudduth Co., Inc.*, 56 RR 2d 1326, 1328 (Rev. Bd. 1984) (Separate

[5] These facts contrast sharply with *Old Time Religion Hour, supra*, 95 FCC 2d at 722-23, 54 RR 2d at 996, where testimonial lack of candor was evidenced by changes in explanations and by inconsistencies, confusion, and convenient lack of recall of recent events.

[6] In any event, the three-year contingency is not decisionally significant. Because Jaramillo's proposed Orlando integration as revealed here on April 28, 1983 was made secondary to her Sacramento proposal and, thus, contingent on the actual dismissal of the Sacramento proposal. Rainbow can receive no credit for her proposed participation in station management—even without reference to the "three-year" proviso. See para. 22, *infra*.

Statement *En Banc*), Commission procedures for considering "contingent" applications and "contingent" integration proposals are far less than pellucid. Consequently, we cannot ultimately fault Rainbow for what we perceive to be a sincere and reasonably prompt, if imperfect, attempt to make full disclosure of the contingent Orlando-Sacramento integration plans of its principals. Accordingly, we will not assess Rainbow a comparative demerit.

12. *Section 307(b) Issue.* Metro and Rainbow propose Orlando, Florida as their community of license; the applicant Winter Park proposes to serve the contiguous community of Winter Park. I.D., Fdgs., paras. 22, 27. Orlando is a major city in east central Florida, has a 1980 population of 127,662, and is served by Orlando International Airport and by two major nationwide bus lines, a railroad, and several motor and freight carriers. *Id.*, para. 23. It is a major tourist center, has its own mayor and city council, has a labor force of about 70,000 people, and has a major daily newspaper and four weeklies. *Id.*, paras. 24-25. Orlando has twelve AM and FM radio stations and four television stations licensed to it. *Id.*, para. 26.

13. Winter Park is an integral part of the Orlando urbanized area, abuts the city of Orlando, and has a 1980 population of 22,339. *Id.*, para. 27. The center of Winter Park is less than 5 miles from the center of Orlando, and the two communities are served by a common local bus system. *Id.*, paras. 23, 27. Winter Park has its own mayor and city council, has a labor force of 12,000 people, and has a weekly newspaper, *Id.*, paras. 28-29. Although Winter Park has four AM and FM radio stations licensed to it, it has no local television station. *Id.*, para. 30. The ALJ, relying on *Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983 (Comm'n), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984), and *Buena Vista Telecasters of Texas, Inc.*, 94 FCC 2d 625, 54 RR 2d 562 (Rev. Bd. 1983), held that although Winter Park nominally proposed a first local

television station while Metro and Rainbow proposed a fifth such outlet, no applicant merited a Section 307(b) preference in this proceeding. I.D., Cncls., paras. 9-10.

14. In its exceptions, Winter Park urges that it should have been awarded a decisive Section 307(b) preference for proposing a first local [**99 FCC 2d 697**] television service to Winter Park. It stresses that its Exhibit 9 establishes firmly that Winter Park is a separate city from Orlando, having different demographic characteristics and needs, and should therefore be preferred under the mandate of Section 307(b). Winter Park further claims that *Cleveland Television, supra*, does not bar it from obtaining a decisive Section 307(b) preference simply because its proposed community is smaller than and adjoins Orlando, the community proposed by its competitors. We disagree.

15. Initially, we point out that Winter Park's strenuous effort to demonstrate that its proposed community of license is a city independent politically, sociologically, and to some extent economically from Orlando, Winter Park Br. at 25-35, is inadequate to establish *simpliciter* that it should be preferred for proposing a first local *television* station there. In fact, the Commission's previous licensing of AM and FM broadcast stations to the city of Winter Park demonstrates clearly its recognition of that city as a separate community entitled to its own local *radio* transmission outlets. Instead, the focus must be on whether a Section 307(b) choice should be made here in the context of a comparative *television* proceeding. That determination, in turn, depends on the concept of "community" as it applies in television cases. For, as the Commission has long recognized:

> [T]he concept of communities within the meaning of Section 307(b) has not been limited to municipalities, but in any given case has been determined by a combination of circumstances. The type of facility sought, the coverage each applicant would provide and the

location and importance of the municipality in relation to nearby cities and towns have been among the factors considered in determining the applicability of 307(b). See *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33, 7 R.R. 2030; *Rossmoyne Corp.*, 7 R.R. 117; *Huntington Broadcasting Co.*, 5 R.R. 721, *Pawtucket Broadcasting Co.*, 4 R.R. 1345. In cases involving mutually exclusive applicants from a principal city and a contiguous suburb, it has been held that where both applicants propose to serve substantially the same areas and populations the term "communities," as used in this section of the Communications Act, is not limited in meaning to "municipalities" but may include metropolitan areas.

St. Louis Telecast, Inc., 22 FCC 625, 712-13, 12 RR 1289, 1369 (1957) *quoted in Cleveland Television, supra*, 91 FCC 2d at 1136, 52 RR 2d at 587. In *Cleveland Television*, a proceeding involving a choice between television applicants proposing Cleveland, Ohio or the contiguous suburb of Shaker Heights as their principal community of license, we held that metropolitan Cleveland was in reality the one large community being applied for, and we awarded no Section 307(b) preference to either applicant. 91 FCC 2d at 1137, 52 RR 2d at 587. Our conclusion followed from analyzing the economic and allocation policy differences between the television and aural broadcast services:

> Television stations, unlike radio, are not divided into classes depending on the size of their coverage areas, and the allocations scheme for television (Sixth Report and [**99 FCC 2d 698**] Order, [41 FCC 148, 167 (1952)]) specifically provides for central cities with large populations to have multiple channel assignments. . . . Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues. Beyond these

> differences, the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes "should be defined in terms of coverage and not in terms of artificial political boundaries." *Evening Star Broadcasting Co.*, 27 FCC 2d 316, 321 n. 4, 20 RR 2d 1311, 1321 n. 3a (1971), *aff'd sub nom. Stone v. FCC*, 466 F.2d 316 (D.C. Cir. 1972). Therefore, television stations--unlike FM broadcast stations—are generally considered as providing "an areawide, rather than a localized service." *St. Louis Telecast, Inc., supra*, 22 FCC at 713, 12 RR at 1369.

Id.

16. We affirm the ALJ's refusal to award a Section 307(b) preference here. The preceding case excerpts make clear that *Cleveland Television* is firmly rooted in established Commission and court precedent, and we agree with the ALJ that its rationale squarely controls the facts of the instant case. Winter Park is a small city abutting Orlando, which is more than five times its size. All three applicants will place a Grade B signal over the metropolitan Orlando area, including the city of Winter Park. Jt. Engineering Exh. 2; Winter Park Exh. 10. Each will serve over 1 million persons. I.D., Fdgs., para. 19. Under these circumstances, the economic need of a television station to attract sizeable advertising revenues to cover the significant costs involved in its ongoing operation creates a strong presumption—unrebutted in this record—that each applicant will serve the entire Orlando metropolitan area. We therefore will not award a Section 307(b) preference to Winter Park. *See Cleveland Television, supra; cf. Buena Vista Telecasters of Texas, supra* (television applicants for Garland and Richardson, Texas, approximately 1/7th and 1/12th the size of neighboring Dallas, held to be applicants for the metropolitan Dallas-Fort Worth urbanized area and

therefore neither would merit a §307(b) preference).[7] [99 FCC 2d 699]

17. *Contingent Comparative Issue: Diversification.* The ALJ awarded no preference to any applicant for diversification of control because he found that none held any attributable media interests. I.D., Fdgs., paras. 34-35; Concls., paras. 13-14. This determination accurately reflects the record evidence and, because no exception to it has been lodged by any applicant, it is final. 47 CFR 1.277(a).

18. *Comparative Coverage.* The ALJ found that Rainbow would provide a fourth television service to 5,323 people in 247 square miles (sq. mi.) and a fifth service to 239,148 people in 1,190 sq. mi.; Metro would provide a fourth service to 4,747 people in 196 sq. mi. and a fifth to 238,764 persons in 1,095 sq. mi.; and Winter Park would render a fifth service to 103,395 people in 510 sq. mi. I.D., Fdgs., para. 20. Also, Rainbow would serve overall 1,476,047 peo-

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[7] We also reject Winter Park's assertion (Br. at 35) that it should receive a preference for its allegedly "unusually good programming service to all those *receiving* service from the station." *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 810 n.5, 51 RR 2d 409, 416-17 n.5 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 15, 1983, *appeal pending*, D.C. Cir. No. 83-2067, filed October 11, 1983, citing *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955) which "precludes the consideration of proposed programming evidence in a Section 307(b) case." The proper focus of a needs showing is on the need of a proposed community of license for a local outlet, not on the uniqueness or excellence of a proposed program service *per se*. *Central Broadcasting Co.*, 3 RR 2d 594 (Rev. Bd. 1964). Winter Park also states that the ALJ impermissibly relied on the rulemaking assignment of the contested channel to Orlando rather than Winter Park as a reason for denying it a Section 307(b) preference. The rulemaking in this case, however, did not foreclose the subsequent Section 307(b) determination, *see WHW Enterprises*, 89 FCC 2d at 811 n.6, 51 RR 2d at 417 n.6; *Campbell and Sheftall*, 7 FCC 2d 658, 9 RR 2d 999 (Rev. Bd. 1967), and the ALJ's holding was largely predicated on the cases cited at para. 13, *supra*.

ple in 8,105 sq. mi.; Metro, 1,443,470 people in 7,598 sq. mi.; and Winter Park, 1,116,211 people in 5,893 sq. mi. *Id.*, para. 19. The ALJ determined that Rainbow deserved a slight comparative coverage preference over Metro and that both of these applicants, in turn, merited a substantial preference over Winter Park. *Id.*, para. 21; Concls., para. 12. We will reduce the comparative coverage preference awarded Metro and Rainbow over Winter Park to a slight to moderate one because, although their fourth and fifth services and overall coverage are substantially greater, they will not provide a first or second reception service to anyone. *See Christian Broadcasting of the Midlands, Inc.*, 57 RR 2d 87, 91-92 (Rev. Bd. 1984), and cases cited therein. As between Rainbow and Metro, we find that the minor coverage differences are too insubstantial to merit any preference. *Cf. Alessandro Broadcasting Company*, 56 RR 2d 1568, 1571-72 (Rev. Bd. 1984) (minor reception advantages too insignificant to provide a meaningful Section 307(b) preference).

19. *Integration of Ownership and Management.* The ALJ awarded Metro 99% credit for proposing the full-time participation of five individuals who each own 19.8% of its voting stock: Arthur Grindle, general manager; William C. Coleman, Jr., director of programming and operations; James W. Hickman, director of finance; Elmer Neal Lincoln, director of sales; and David L. Peoples, director of public affairs and community relations. I.D., Fdgs., paras. 36-59; Concls., para. 15. Grindle is a civically-active long-term resident of the proposed service area and has some broadcast experience. He is also a member of the Florida House of Representatives, which meets at least two months per year. Coleman is a long-term Orlando resident, participates some in civic affairs, and has some broadcast experience. Hickman is a longterm service area resident with some civic activity. Lincoln lived in the service area from 1975-83, will [99 FCC 2d 700] return to Orlando if Metro's application is granted, and is a Black male. Peo-

ples has lived in the service area since 1974 and in 1983 moved to Orlando; he is civically active. The ALJ found that Rainbow would integrate full time Joseph Rey, an 85% general partner, as general manager, and Rey's mother, Esperanza Rey-Mehr, a 5% general partner, as director of Hispanic affairs; he rejected as inconsistent with her Sacramento integration pledge the proposed integration of Leticia Jaramillo, a 10% general partner, as full-time program manager. I.D., Fdgs., paras. 12, 60-68. Mr. Rey will move to Orlando if Rainbow's application is granted; Mrs. Rey-Mehr has been an Orlando resident since 1978. Both are Hispanic and, of course, Mrs. Rey-Mehr is female. Mr. Rey has significant past broadcast experience. Winter Park, in turn, was credited only for the part-time (20 hours per week) integration of Hal H. Kantor, a 10% stockholder, as general manager. *Id.*, paras. 69-71. Mr. Kantor has been an Orlando resident since 1972 and has some civic involvement. The ALJ did not compare Rainbow's integration proposal with those of its opponents but did award Metro a "clear and decisive" overall integration preference over Winter Park. *Id.*, Concls., para. 15.

20. In their exceptions, Rainbow and Winter Park challenge Metro's ability to effectuate its 99% full-time integration proposal. We disagree with this contention except as it relates to Metro principal Arthur Grindle, as will be discussed at paragraph 21, *infra*. First, we reject Rainbow's claim (Br. at 32-33) that Metro stockholder James Hickman's full-time integration commitment is unreliable because of an alleged conflict in his testimony as to how many hours per week he is currently working. Tr. 390-426. Hickman essentially stated that he had recently begun cutting back sharply his commitments to time-consuming projects that could have interfered with his ability to work at the station, reaffirmed his intention to work at least 40 hours per week in station management, but also indicated that he was a "workaholic" who "had been working a 40 hour week for a long time." In short, Hickman's

testimony is fully consistent with, and supportive of, his integration pledge, and will therefore be credited. Second, Rainbow claims (Br. at 33-34) that Metro principal Elmer Lincoln will not be able to effectuate his full-time integration proposal principally because of his current time-consuming involvement in his automobile dealership. We reject this contention because of his unrefuted commitment to turn complete control over the management of that business to his recently hired general manager trainee and, should this arrangement prove unsatisfactory, to sell the business. Metro Exh. 8 at 3; Tr. 287. Similarly, we deny as unsupported by the record evidence Winter Park's broad assertion (Br. at 46, 47-48) that the current business interests of Metro principals William Coleman, David Peoples, and James Hickman make their integration proposals unlikely to be effectuated. *See* **[99 FCC 2d 701]** *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 585-589, 51 RR 2d 1478, 1480-483, *recon. denied*, 92 FCC 2d 94, 51 RR 2d 1383 (Rev. Bd. 1982), *review denied*, FCC 83-415, released September 21, 1983, *recon. denied*, FCC 84-73, released March 15, 1984, *appeal pending sub nom Blake-Potash Corp. v. FCC*, No. 83-2112 (D.C. Cir., filed October 21, 1983).

21. Nevertheless, we believe that some reduction in Metro's integration credit is in order for Arthur Grindle's proposed participation as general manager. As Rainbow (Br. at 31) and Winter Park (Br. at 46-47) contend, the uncontroverted record evidence shows that Mr. Grindle, as a member of the Florida House of Representatives with several subcommittee assignments, will have to spend two months per year at the state capital, Tallahassee. I.D., Fdgs., paras. 40, 43-44 and n. 14. Because the Commission emphasizes that ownership participation in management is most meaningful when rendered on a full-time and day-to-day basis and that credit given for it drops sharply to the extent time spent moves away from full time, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d

393, 395, 5 RR 2d 1901, 1909 (1965), we shall award Metro part-time credit only for Grindle's integration because of his necessary public commitment to be absent two months a year from the station. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 950-51, 50 RR 2d 1142, 1147 (Rev. Bd. 1982) (applicant awarded part-time credit only for proposed 40-hour per week management participation of owner who will take three to four month vacations every year). In total, Metro is credited with 79.2% full-time plus 19.8% part-time quantitative integration.[8] **[99 FCC 2d 702]**

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[8] We also have considered and now reject:

(a) Rainbow's attack (Br. at 24-26) on Metro's integration based on the collateral integration promises of its principals made in the Cape Coral, Florida television proceeding. Metro's principals have testified here that their Orlando commitments take precedence over their Cape Coral pledges. Tr. 290-93, 368. *See* para. 25, *infra*.

(b) Rainbow's description (Br. at 26-30) of Metro's corporate structure, which involves voting and non-voting classes of stock, as a "sham." It has failed to specifically allege or show that Metro's stockholders vote in percentages that vary from their actual ownership as revealed on the "B" cut-off date. Its allegation that non-voting stockholders attend stockholder meetings does not establish that they actually vote or have otherwise retained the right to vote. Under the facts of this case, the ALJ properly based his award of integration credit on the amount of voting stock owned. *See Bradley, Hand and Triplett*, 89 FCC 2d 657, 662, 51 RR 2d 383, 387 (Rev. Bd. 1982).

(c) Winter Park's claim (Br. at 43-45) that Metro and Rainbow should receive no integration credit because their proposals were submitted after the "B" cut-off date in this proceeding. Because both the old and the new versions of the application form, FCC Form 301, do not expressly call for an applicant's complete integration proposal, Commission practice has been to permit such proposals to be filed at the hearing. *See WHW Enterprises, supra* note 7, 89 FCC 2d at 817, 51 RR 2d at 421; *cf. Vacationland Broadcasting Co., Inc.*, 55 RR 2d 1299, 1304 (Rev. Bd. 1984) (in the future, applicants must specify precise hour-per-week integration proposals in direct written cases), *recon. denied*, 56 RR 2d 1260. *But see* note 9, *infra*.

22. Rainbow also avers (Br. at 21-24) that the ALJ erroneously struck its Exhibit 2 which contains Ms. Jaramillo's testimony that she will be integrated full time at the proposed Orlando station. Rainbow points out that her testimony indicates unequivocally that she will fulfill her Orlando integration commitment and that the collateral Sacramento application filed by El Dorado, to which she had on April 28, 1983 nominally pledged her primary managerial loyalty, was dismissed on August 11, 1983, prior to commencement of this hearing. See paragraphs 5-6, 8, *supra*. Therefore, Rainbow seeks additional 10% quantitative integration credit which corresponds to Ms. Jaramillo's ownership share. Although we do not believe that the ALJ should have stricken her written testimonial exhibit, we nevertheless affirm the ALJ's conclusion not to credit Rainbow for Ms. Jaramillo's proposed integration. During the time period begining April 28, 1983 when Ms. Jaramillo first proposed primary fealty to Sacramento and August 11 when the El Dorado application was dismissed, her integration commitment to Orlando was stated to the Commission to be secondary to her Sacramento pledge. Moreover, she testified in this proceeding that if the settlement in Sacramento had failed and El Dorado's application been granted, she would have fulfilled her pledge to serve as general manager at Sacramento and cancelled her alternative plan to be Rainbow's program manager. See paragraph 8, *supra*; Tr. 703-04, 740-41, 752-53. In other words, her Orlando plans were made contingent on the dismissal of the El Dorado application, an event which Rainbow could have prevented by simply opting not to enter into the subsequent settlement agreement. That Rainbow voluntarily chose another course does not render her proposal any less "conditional and uncertain" than the one rejected by the Board in *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 431, 55 RR 2d 627, 634 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1394 (1984). Accordingly, as in *High Sierra*, we shall award no credit for such a

contingent integration proposal. We therefore award 90% full-time quantitative credit to Rainbow for the proposed participation of Joseph Rey and Esperanza Rey-Mehr.[9] [**99 FCC 2d 703**]

23. *Integration Summary.* Metro has been credited with 79.2% full-time plus 19.8% part-time quantitative integration credit; Rainbow, 90% full-time credit; and Winter Park, 10% part-time only credit. Both Metro and Rainbow are therefore awarded substantial preferences over Winter Park which has no full-time credit and cannot overcome its overwhelming quantitative deficit with qualitative enhancements. *See Cleveland Television, supra*, 91 FCC 2d at 1141, 52 RR 2d at 590; *New Continental Broadcasting Company*, 88 FCC 2d 830, 850, 50 RR 2d 1117, 1133 (Rev. Bd. 1981), *remanded on other grounds*, 93 FCC 2d 1275, 53 RR 2d 1004 (Comm'n 1983). There is thus no need to

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[9] We also reject Rainbow's exception (Br. at 22-23 n. 13) to the ALJ's *Order*, FCC 83M-940, *supra*, requiring the applicants to submit their integration proposals prior to commencement of the hearing. Rainbow attacks this ruling as "impermissible compulsory discovery." We disagree. Although the Board has permitted information not called for by the application form to be first supplied at hearing in an applicant's direct written case, *see WHW Enterprises, supra*, we specifically approve of the procedure employed here as a proper exercise of the ALJ's plenary authority pursuant to Section 1.243 of the Rules, 47 CFR 1.243, to regulate the course of the hearing. *See Wind River Communications, Inc.*, 55 RR 2d 579 (Rev. Bd. 1984); *see also Ruarch Associates*, 56 RR 2d 1593, 1595 n. 3 (Rev. Bd. 1984); *Service Electric Cable TV, Inc.*, 37 FCC 2d 119, 122 n. 14, 25 RR 2d 135, 139 n. 14 (Rev. Bd.), *aff'd*, 37 FCC 2d 583, 25 RR 2d 595 (Comm'n 1972). We believe that the comparative hearing process is improved when the presiding officer issues a formal order that requires all the applicants to submit complete, written statements of their principals' ownership participation plans, including their precise hour-per-week commitment to station management, their proposed roles, and a complete itemization of all qualitative enhancement credits claimed. Such a prehearing submission provides all parties with information needed to assess their comparative chances of prevailing at hearing and thereby not only expedites matters but also encourages earlier settlements and lessened litigation.

consider further Winter Park's enhancement credit. Rainbow is quantitatively ahead of Metro, and while its 10.8% advantage is probably a "clear" enough difference to be decisional, *see New Continental, supra* (12.5% differential is "clear"), we conclude that it is also ahead qualitatively. In particular, Rainbow is awarded a substantial preference for minority participation by 90% of its stock ownership (Mr. Rey and Mrs. Rey-Mehr) in contrast with Metro's 19.8% credit for Mr. Lincoln. *See Waters Broadcasting Corporation*, 91 FCC 2d 1260, 1264, 52 RR 2d 1063, 1067 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). It also receives a solid broadcast experience preference because the past broadcast experience of its 85% principal Mr. Rey is much more significant and attaches to larger ownership than that of Metro principals Coleman (19.8% owner participating full time) and Grindle (19.8%, part-time). Finally, it is very slightly ahead on female ownership participation (5% for Mrs. Rey-Mehr v. 0% for Metro). *See KIST Corp.*, 57 RR 2d 49, 65 (Rev. Bd. 1984). On the other hand, Metro is awarded a moderate preference for superior local residence and civic participation because of (a) the long-term local residence of Mr. Coleman as further enhanced by his involvement in some civic activity; (b) the long-term service area residence of Mr. Hickman as further enhanced by his involvement in some civic activity; (c) the moderate-term service area and short-term local residence and civic activity of Mr. Peoples; and (d) the moderate-term service area and [**99 FCC 2d 704**] proposed future residence of Mr. Lincoln. In addition, it receives slight additional credit because its 19.8% part-time participating principal, Mr. Grindle, is a civically-active local resident. By comparison, Rainbow is credited for the proposed future residence of an 85% owner, Mr. Rey, and the local residence since 1978 of a 5% owner, Mrs. Rey-Mehr. The size of Metro's preference is less than maximal largely because less than half (39.6%) of its full-time participating ownership has long-

term residence, either locally or in the service area, and only half of that amount represents residence that is truly local. *See Policy Statement*, 1 FCC 2d at 396, 5 RR 2d at 1910 (Commission prefers longer term residence); *Waters Broadcasting Corporation, supra*, 91 FCC 2d at 1263, 52 RR 2d at 1066 (service area residence "closely follows" in importance local residence). We conclude that, although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs Metro's local residence and civic participation advantage. *Cf. Phoenix Media Corp.*, 56 RR 2d 1241, 1249-50 (Rev. Bd. 1984). Therefore, based on its quantitative and qualitative edge, we award Rainbow a slight overall integration preference over Metro. *See New Continental Broadcasting Co., supra.*

24. *Auxiliary Power.* The ALJ rejected Metro Exh. 4 and Rainbow Exh. 5 which proposed auxiliary power, because he was aware of no precedent awarding such a preference in television cases. Tr. 98-104; 656-57. Based on our recent decisions in *San Joaquin Television Improvement Corp.*, 96 FCC 2d 594, 604, 54 RR 2d 1206, 1214 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 617, 55 RR 2d 1186 (Rev. Bd. 1984), and *Minority Broadcasters of East St. Louis, Inc.*, 56 RR 2d 275, 283 (Rev. Bd. 1984), which applied the Commission's *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966), to television cases, we overturn the ALJ's rulings and award Metro and Rainbow slight auxiliary power preferences over Winter Park. In so doing, we reject Rainbow's claim that Metro should receive no preference because it first proposed auxiliary power in its direct written case, which was filed considerably after the "B" cut-off date in this proceeding. As has long been the case with integration proposals, see notes 8 and 9, *supra*, the application form now no longer expressly requests auxiliary power information.[10] Therefore, Metro properly filed its proposal as part of its direct case. However, we point out that an ALJ, pursuant to his plenary authority to regulate the course of the hearing may require that auxiliary power as well as integration proposals be submitted at an earlier [**99 FCC 2d 705**] time. *See* notes 8 and 9, *supra*. Because no such requirement was set forth in the instant case, Metro's proposal was timely.

25. *Motion to Enlarge Issues.* Winter Park excepts (Br. at 37-41) to the ALJ's *Memorandum Opinion and Order*, FCC 83M-3715, released October 19, 1983, which denied its August 31, 1983 motion to enlarge issues. Winter Park had sought the addition of reporting and misrepresentation/lack of candor issues against Metro because it did not timely report in this proceeding the filing by its principals of an application for a television station at Cape Coral, Florida. The ALJ denied the motion because he found that Metro's failure to report was inadvertent, that the Cape Coral application reported the pendency of the instant Orlando application, and that Metro voluntarily disclosed the existence of the Cape Coral application when it exchanged its hearing exhibits in this case. *Id.* We deny Metro's exception because the record reveals no intent by Metro or its principals to conceal, deceive, or mislead; the Cape Coral application has proven to be decisionally insignificant here, *see* note 8, para. (a), *supra*; and there is no pattern of repeated violations or other circumstances reflecting the presence of significant carelessness or inattentiveness. *See Merrimack Valley, supra.* In any event, enlargement of the issues at this stage would be pointless because Metro is not comparatively the best applicant here.

26. *Conclusions.* All decisionally significant exceptions have been considered. Rainbow has been found to be basically qualified and no applicant has been awarded a pref-

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[10] Formerly, auxiliary power equipment had to be listed in the application item requiring a listing of costs for technical equipment.

erence under Section 307(b) or under the comparative factor of diversification of control. Rainbow has been given a slight integration preference over Metro, and both of these applicants have been awarded substantial integration, slight to moderate comparative coverage, and slight auxiliary power preferences over Winter Park, which therefore "shows" in third place. As between Rainbow and Metro, Rainbow's slight integration preference, based on both its quantitative and qualitative advantages, is sufficient to carry the day. *See New Continental, supra.* We therefore conclude that a grant of the Rainbow application will best serve the public interest, convenience, and necessity.

27. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed June 25, 1984 by Rainbow Broadcasting Company IS GRANTED, and the amendment IS ACCEPTED; and

28. IT IS FURTHER ORDERED, That the applica- [**99 FCC 2d 706**] tion of Rainbow Broadcasting Corporation (File No. BPCT-820909KF) for a new commercial television station at Orlando, Florida IS GRANTED, and the applications of Metro Broadcasting, Inc. (File No. BPCT-820707KE) and Winter Park Communications (File No. BPCT-820909KV) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS,
Member, Review Board

STATEMENT OF BOARD MEMBER
NORMAN B. BLUMENTHAL
Concurring *Dubitante*

Because, as the majority accurately observes at paragraph 11, *ante*, our recent statement attending *The Gene Sudduth Co., Inc.*, 56 RR 2d 1326, 1328 (Rev. Bd. 1984),

explains that our policy on "contingent" ownership integration proposals is amorphous and, hence, may have even invited some of the mischief narrated in paragraphs 4-11 of the *Decision*, I would not disqualify this winning applicant (Rainbow) for its pluck. On the other hand, I do not accept all of the findings and conclusions of the majority which tend to envelop the winning applicant's actions in miasma of guileless ignorance, nor do I join the characterizations, in the literal sense, of the ALJ's rulings relating to that applicant's maneuvers. (*See ante* paras. 9-10.) The ALJ's vigilance was salutary.

As ventilated in the *Gene Sudduth* appendix, the problem of "contingent" integration proposals is burgeoning; and the fact that it has taken the majority 6 pages to here unscramble Rainbow's clues as to its probable intentions is a testament to the emergent brain-twister "Proviso" which—like "Trivial Pursuit"—has spawned a jolly constituency. Just one, but far from unitary, example of how this frisky pastime operated in this single case is illustrated as follows. The dual Rainbow principals jointly filed virtually contemporaneous applications for a pair of widespread television channels, the first in Sacramento, California, the second in Orlando, Florida. Fulltime integration was, at various points, pledged by *both* principals at *both* stations. When forced to declare by the two different ALJs in the respective TV proceedings, one of the Rainbow principals (Rey) was depicted in an application amendment in the following Butterfly Straddle:

> Mr. Rey has also proposed to serve in a fulltime management role at the Sacramento station, but only to the extent that such involvement would not interfere with his commitment to serve as the fulltime general manager of the Orlando station.

See ante para. 5 Paragraphs 4-11 of the *Decision* are enlivened by similar hedgehopping by the second Rainbow principal (Jaramillo). We are told by Rainbow—in later

testimony—that one of the apparently inconsistent integration pledges was, by that time, " 'hypothetical' or 'academic exercise.' " (*See ante* para. 8.) Probably, but why was that fact not clearly **[99 FCC 2d 707]** spelled-out at the time of the pertinent filings?[1]

While we recently sought the Commission's assistance on this matter of "contingent" proposals in *Gene Sudduth*, it falls, perhaps, to the Board—the agency's appointed first line of review—to lay down the law (at least tentatively) so as to discourage the unchecked growth of such pestilence. Short of barring "contingent"—and certainly "hypothetical"[2]—integration proposals, a rather inflexible remedy,[3] I would urge:

1. That *no* credit be given to any integration pledge that is contingent on the outcome of another pending application (the outcome of which cannot be known for certain until all *certiorari* appeals are exhausted)[4];

2. That any "contingent" integration proposals be timely spelled out in *all* relevant proceedings, *particularly* the priorities, and that any ambiguities be construed most strongly against the propositioning party; and

3. That any patently inconsistent integration proposals on file at the same moment be considered a disqualifying misrepresentation.

[1] The answer is as obvious as it is cynical: Rainbow (by its California alter ego, El Dorado sought to maintain its "hypothetical" integration pledge in Sacramento for as long as it could get away with it so as to extract a larger settlement for dismissal of the El Dorado application. *See generally ante* para. 8.

[2] Maintenance of any "hypothetical" integration proposals should be regarded as abuse of process.

[3] This strict remedy has recently been set down by the Commission to apply when "contingent" applications would be *prima facie* inconsistent with our multiple ownership rules. *See Gene Sudduth; William H. Hernstadt*, 56 RR 2d 948 (M.M. Bur. 1984). The Media Bureau has wisely indicated that it would not waste the public's time and money nor that of competing applicants, by processing "contingent" applications, only one of which can be granted as prosecuted.

[4] The Board has properly applied that principle in this case. *See ante* note 6 and para. 22.

License applicants have been long admonished that: "As a licensing authority, the Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth.' " *RKO General v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1982) (citation and subsequent history omitted). Some applicant, soon, may become the victim of the fatal lack of candor finding so narrowly eluded by the peripatetic applicant here.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1988

No. 85-1755

Winter Park Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

Rainbow Broadcasting Company,
Metro Broadcasting, Inc.,
Winter Park Chamber of Commerce and
City of Winter Park,
Intervenors

and Consclidated Case No. 85-1756

FILED APR 21 1989

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: EDWARDS, WILLIAMS and FRIEDMAN,* Circuit Judges

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Federal Communications Com-

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* of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

mission and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are denied, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Wendy Jennis
for CONSTANCE L. DUPRE, CLERK

Date: April 21, 1989
Opinion for the Court filed by Circuit Judge Edwards.
Opinion concurring in part and dissenting in part filed by Circuit Judge Williams.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1988

No. 85-1755

Winter Park Communications [sic]
Appellant

v.

Federal Communications Commission,
Appellee

Rainbow Broadcasting Company, *et al.*,
Intervenors

And consolidated case No. 85-1756

[Filed Jun 21, 1989]

BEFORE: Edwards, Williams and Friedman, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of Metro Broadcasting, Inc. and Winter Park Communications, Inc., it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:
Constance L. Dupre, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Williams would grant the petition for rehearing of Metro Broadcasting, Inc.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 85-175

Winter Park Communications,
Appellant

v.

Federal Communications Commission,
Appellee

Rainbow Broadcasting Company, *et al.*,
Intervenors

And consolidated case No. 85-1756

[Filed Jun 21, 1989]

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of Metro Broadcasting, Inc. and Winter Park Communications, Inc. have been circulated to the full court. The taking of a vote was requested on the suggestion of Metro Broadcasting, Inc. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the aforesaid suggestions are denied.

FOR THE COURT:
Constance L. Dupre, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Silberman, Williams, D.H. Ginsburg and Sentelle would grant the suggestion of Metro Broadcasting, Inc.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States of America provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual time of War or public danger; nor shall any person be subject for the same offence to be put twice in jeopardy of life or limb, nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Section One and Section Five of the Fourteenth Amendment to the Constitution of the United States of America provide as follows:

> SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*,

Public Law Number 100-202, 101 Stat. 1329 (1987) are as follows:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C. 2d 1591, *as amended*, 55 R.R. 2d 1313 (1982) and *Mid-Florida Television Corp.*, 60 F.C.C.2d 607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-457, 102 Stat. 2216-17 are as follows:

> For necessary expenses of the Federal Communications Commission . . . *Provided*, That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, of to continue a reexamination of, the policies of the Federal Communications Commission with respect of comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and *Mid-Florida Television Corp.*, 60 F.C.C. 2d

607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. . . .

The pertinent portions of the *Communications Amendments Act of 1982* Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982, 47 U.S.C. §§ 309 (i) (3) (A) - (4) (A):

(3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of minority group.

(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communication" included television, radio, cable television, multipoint distribution service, direct broadcast satellite service,

and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The commission [sic], not later than 180 days after the date of the enactment of the Communications Technical [sic] Amendments Act of 1982, shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19

No. 85-1755

Winter Park Communication, [sic]

Appellant

v.

Federal Communications Commission,

Appellee

and consolidated case No. 85-1756

United States Court of Appeals
For the District of Columbia Circuit

FILED MAR 17 1989
CONSTANCE L. DUPRE
CLERK

BEFORE: Edwards and Williams, Circuit Judges, and Circuit Judge Friedman, U.S.C.A. for the Federal Circuit

ORDER

Upon consideration of Metro Broadcasting, Inc.'s motion for leave to file supplemental brief, and the opposition thereto, it is

ORDERED that the aforesaid motion be denied. The Clerk is directed to return the lodged supplemental briefs to counsel for Metro Broadcasting, Inc.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

/s/ Fred A. Braun
By: Fred A. Braun
Deputy Clerk

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W. FCC 86-387
WASHINGTON, D.C. 20554 36874

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September 15, 1986

COMMISSION GIVES DIRECTIONS CONCERNING COURT BRIEF IN STEELE V. FCC, NO. 84-1176 (D.C. CIR.)

On November 22, 1985 the United States Court of Appeals for the District of Columbia Circuit directed the Commission to address two issues in the case of *Steele* v. *FCC*, No. 84-1176:

1) whether the FCC has statutory authority to grant a limited preference for integrated ownership-management by women applicants in comparative license proceedings.

2) whether such a grant is constitutional.

This Commission has continued the practice of awarding racial and gender preferences without addressing these issues heretofore, because it thought such preferences to be required as a result of the Court's decision in *TV-9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). Having now reviewed these issues at the court's invitation, the Commission is concerned that its policies in this area do not at present satisfy constitutional and statutory legal requirements.

As the Commission understands the law, racial and gender preferences are constitutionally suspect and before they can be imposed the agency must have an "exceedingly

persuasive justification." *Mississippi Union* [*sic*] *for Women* v. *Hogan*, 458 U.S. 718, 724 (1982). The Commission has relied upon the "reasonable expectation" standard imposed by the court in *TV-9*, and it therefore has never ascertained whether there was an exceedingly persuasive justification for its preference policies. Therefore, the Commission has directed the General Counsel to make these views known to the court and seek to have the *Steele* case remanded for further consideration.

The Commission did not address the issue of whether a policy giving preferences to women and minorities could ever be constitutional, that is, whether an exceedingly persuasive justification could in fact be established. The Commission anticipates looking at this issue and instituting a proceeding to collect evidence if allowable in light of the court's *en banc* action in *Steele*.

Action by the Commission September 12, 1986. Commissioners Fowler (Chairman), Quello, Dawson, Patrick and Dennis.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

FCC 89-157
2857

News media information 202/832-5050.
Recorded listing of releases and texts 202/832-0002

May 15, 1989

COMMISSION FILES PETITION FOR REHEARING *EN BANC* IN *SHURBERG* v. *FCC*

On March 31, 1989, a divided panel of the U.S. Court of Appeals of the D.C. Circuit struck down the distress sale policy as unconstitutional, in *Shurberg Broadcasting of Hartford, Inc. v. FCC.*

The Commission has voted 2-1, with Chairman Patrick dissenting, to instruct the General Counsel to petition the court for rehearing *en banc* and, in so doing, to defend the constitutionality of the distress sale policy.

In accordance with these instructions, the General Counsel today filed with the court a petition for rehearing reflecting the views of Commissioners Quello and Dennis. Chairman Patrick has set forth his dissenting views in a statement attached to this Notice.

Action by the Commission May 15, 1989, by Public Notice (FCC 89-157). Commissioners Quello and Dennis, with Chairman Patrick dissenting and issuing a statement.

[4 FCC Rcd 4511]
Dissenting Statement
of
Chairman Dennis R. Patrick

In re: Petition for Rehearing and Suggestion For Hearing En Banc filed in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir.)

The issue before the D.C. Circuit in both *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir., Mar. 31, 1989), and *Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C. Cir., Apr. 21, 1989), properly framed, is whether the court's opinion in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (1975), remains valid in light of subsequent Supreme Court decisions. *See City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Had my fellow Commissioners agreed to discuss *all* relevant case law when requesting the court to examine this issue, I would have unhesitatingly agreed.

The Commission's minority preference policies have a tortured past. The Commission initially took the position that minority preferences should be granted only after the minority applicant clearly demonstrated that program and viewpoint diversity would be fostered through minority ownership. After being directed by the D.C. Circuit to presume a nexus between minority ownership and program diversity,[1] the Commission developed various preferences designed to promote minority ownership, including the distress sale policy at issue in *Shurberg*, the comparative preference policy and the tax certificate policy. *See Policy Statement on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 (1978). The Commission later extended

[1] *TV 9, Inc. v. FCC*, 495 F.2d 929, (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

the comparative preference policy to females. *See Mid-Florida Television Corp.*, 69 F.C.C. 2d 607, 652 (1978). The constitutionality of that policy was challenged in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated and rehearing en banc granted*, Order of Oct. 31, 1985, *remanded* Order of Oct. 9, 1986. At that point, the Commission believed that "both the gender and racial preference schemes conflict with equal protection standards under the Constitution." Supplemental Brief for the Federal Communications Commission at 13, *Steele v. FCC*, No. 84-1176 (D.C. Cir.). The Commission unanimously concluded, based on recent Supreme Court decisions applying equal protection analysis, that racial classifications may not be based on the assumption alone, without a factual predicate, that integrated minority owners will result in increased programming and viewpoint diversity. *Id.* As a result the Commission urged the court to permit us to undertake a comprehensive inquiry into the legal and factual predicate of our preference policies to determine whether a nexus truly does exist between minority ownership and program diversity. The Commission thereafter undertook such a study designed to provide a fuller record and to gather the empirical data necessary to support retention of our preference scheme. *Notice of Inquiry* in MM Docket No. 86-784, FCC 86-549, 1 FCC Rcd. 1315 (1986). Prior to the completion of this study, however, Congress decreed that the FCC expend no funds in fiscal year 1988 to complete its research or to change its preference policies.[2] In compliance with this congressional mandate, the Commission

[2] *See Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-202 (signed Dec. 22, 1987). The appropriations legislation prohibits the Commission from using funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" the Commission's policies premised on racial, ethnic or gender classification, except to: (1) close its proceeding investigating the preference policies; (2) reinstate prior policy; and (3) lift any suspension imposed on implementing the policies pending its investigation.

closed its rulemaking, without issuing any findings or conclusions, and reestablished all preference policies.

Two cases before the D.C. Circuit were thus made ripe for decision. First, in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir. March 31, 1989), the court was asked to rule on the constitutionality of the distress sale policy. Second, in *Winter Park Communications Inc., v. FCC*, No. 85-1755 (D.C. Cir. April 21, 1989), it was presented with the same question regarding minority preferences in the comparative hearing process. In both cases, the panels dealt with the continuing validity of *West Michigan*, in which the court had found the Commission's minority preference policy consistent with the Supreme Court's holdings in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

In *Shurberg*, each of the three separate opinions treats *West Michigan* differently. Judge Silberman questions *West Michigan*'s initial conclusion that there is a compelling government interest in increasing diversity of programming and goes on to conclude that it may, in any event, be undermined by the Supreme Court's recent decision in *Croson*. Judge MacKinnon's opinion does not address *West Michigan per se* but insists that preference policies must be narrowly tailored, while Judge Wald concludes that at least some of the conclusions in *West Michigan* have *not* been undermined by subsequent Supreme Court decisions.

In *Winter Park*, Judge Edwards finds the comparative preference policy to be constitutional under *West Michigan*, while Judge Williams, in a dissent, argues persuasively [4 FCC Rcd 4512] that *West Michigan* has been largely undermined by *Wygant* and *Croson*. Thus, we have five different opinions on the continuing validity of *West Michigan* and the constitutional standards to be applied to minority preference policies. To further trouble an already complex issue, the two panels have also given a range of opinions

on the weight and meaning to be given to the Congressional appropriations limits regarding our preference policies.

In light of the importance and complexity of these issues, particularly given recent Congressional actions and the varying opinions in *Shurberg* and *Winter Park*, I would petition the D.C. Circuit to hear *Shurberg en banc* and support a petition for rehearing on *Winter Park*. Both cases could be considered together and the court could give us definitive guidance. But I cannot support my fellow Commissioners' approach of requesting only partial enlightenment in this area.

Nor can I agree with the substantive arguments they make. Recent Supreme Court precedents collectively make clear that racial and gender classifications are inherently suspect and will be subject to close and careful scrutiny.[3] Most significantly, after *Croson*, the standard of review required for *any* governmental classification based on race is strict scrutiny. *City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132, 4139 (Part III-A) and 4146 (Scalia, J. concurring).

The first stage of equal protection analysis under strict scrutiny requires a determination as to whether there is a compelling government objective. The Supreme Court has only identified two compelling interests for race-based policies. First, such minority preference policies may be implemented to remedy past discrimination. *Fullilove*, 448 U.S. at 475.[4] Second, at least Justice Powell in *Bakke*

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[3] *See e.g., City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989); *Wygant v. Jackson Board of Education*, 90 L. Ed. 2d 260 (1986); *Fullilove v. Klutznik*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See also Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

[4] The Commission has never claimed that its preference policies are intended to remedy prior discrimination against minorities or to provide remedial benefits. It could be argued that Congress has separately adopted our policies as its own, with the justification that its policies are remedial. But Congress did not justify its funding decision as remedial. As my fellow Commissioners agree, Congress relied solely on a diversity rationale. FCC Petition for Rehearing at n.1.

believed that, for educational institutions, academic diversity is a compelling government interest.[5] *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.).

From this second justification, the D.C. Circuit in *West Michigan* extrapolated to find "program diversity" in broadcasting a compelling interest. This premise, set out in *West Michigan*, relies on Justice Powell's opinion in *Bakke* that a diverse educational environment is a compelling goal that may be constitutionally promoted by certain admissions policies which recognize race as one of several factors. As racial diversity is only one aspect of a truly diverse student body, Justice Powell believed that a university could use race as one factor in a multi-factor admissions decision.[6]

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[5] It is unclear after *Croson* whether Justice Powell's diversity rationale would be endorsed by the present Court. A plurality of the Court in that case quite clearly stated that classifications based on race should be "strictly reserved for remedial settings." *Croson*, 57 U.S.L.W. at 4139, *see also id.* at 4146 (Scalia, J., concurring). And Justice O'Connor, who had indicated some sympathy for Justice Powell's diversity rationale, *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring), appears to have rejected that rationale in *Croson*. Justice Stevens interpreted Justice O'Connor's opinion as such a rejection, *Croson*, 57 U.S.L.W. at 4144 n.1 (Stevens, J., concurring in part), as has Judge Silberman, *Shurberg*, Silberman opin. at 35-39. While Judge Wald agrees as to the substance of Justice Stevens' interpretation of the O'Connor opinion, *Shurberg*, Wald opin. at 18 n.20 (dissenting), she herself would read that same opinion differently. With all due respect to Judge Wald, I must defer to the interpretation of *Croson* rendered by a member of the Supreme Court. Thus, in light of the Court's decision in *Croson*, whether the academic diversity rationale remains as a compelling government interest for race-based policies is an open question. Certainly then, extensions of that rationale cannot be supported.

[6] The plan before the *Bakke* court, however, employed a racial set-aside, which did not account for other diversity factors. As Justice Powell wrote in *Bakke*, "preferring members of any one group for no

Similarly, if one assumes program diversity to be a compelling goal, race is but one factor which may bear on diversity of viewpoint.[7] Because minority status is the exclusive criterion for use of the distress sale policy, I fail to see why that policy passes even Justice Powell's test. Outside the remedial context, the Supreme Court has *never* upheld a preference policy based solely on race, and has specifically rejected the use of minority set-asides as a means of promoting diversity. *Bakke*, 438 U.S. at 314-18.

Citing *Fullilove*, my fellow Commissioners see no reason why the court should not extend its findings in the remedial context to the diversity arena. I submit that one does not necessarily lead to the other. It is clear after the Supreme Court's decision in *Croson* that race-based measures are subject to the highest degree of scrutiny. Where evidence of past discrimination exists, the Court may well tolerate race-based *remedial* measures. But where the more nebulous goal of diversity is at issue, the most that even Justice Powell would permit is the consideration of race as one of several factors. There is no basis to think the Court would allow more.

Ensuring that minority perspectives can be aired in a diverse broadcast marketplace is an important policy goal which I support. But our station licensing and transfer policies must, above all else, guarantee equal protection of the laws to all Americans. As such, our race-conscious policies must be subjected to the most rigorous review to insure fidelity to this principle.

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reason other than race or ethic origin is discrimination for its own sake. This the Constitution forbids.'" *Bakke*, 438 U.S. at 307. The Court thus struck that plan down as unconstitutional.

[7] As I have previously noted, however, the Commission has been prohibited from determining whether race is a factor in viewpoint diversity, that is, whether there is a nexus between minority ownership and programming.

In this case, my fellow Commissioners have chosen to appeal a decision with which they disagree (*Shurberg*) and let stand a second decision with which they feel more comfortable (*Winter Park*) despite hopeless confusion and conflict in the relevant case law. The principle of "equal protection" deserves better.

May 15, 1989

[4 FCC Rcd 4514]
PUBLIC NOTICE

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2858

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May 15, 1989

COMMISSION DECLINES TO SUPPORT REHEARING *EN BANC* IN *WINTER PARK v. FCC*

On April 21, 1989, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld the constitutionality of awarding minority preferences in the comparative hearing process, in *Winter Park Communication, [sic] Inc. v. FCC.*

The Commission has voted 2-1, with Chairman Patrick dissenting, not to support rehearing *en banc.*

Action by the Commission May 15, 1989, by Public Notice (FCC 89-158). Commissioners Quello and Dennis, with Chairman Patrick dissenting and issuing a statement and Commissioner Dennis issuing a statement.

[4 FCC Rcd 4514]
Dissenting Statement
of
Chairman Dennis R. Patrick

For the reasons stated in my dissent to the petition for rehearing in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, No. 84-1600 (D.C. Cir., decided Mar. 31, 1989), I respectfully dissent to my fellow Commissioners' refusal to support rehearing in *Winter Park Communications, Inc.* v. *FCC*, No. 85-1755 (D.C. Cir., decided Apr. 21, 1989).

[4 FCC Rcd 4514]
Separate Statement
of
Commissioner Patricia Diaz Dennis

Re: *Winter Park Communications, Inc. v. FCC*

Frankly, I am puzzled that the Commission is issuing a press release announcing that we will not appeal a case we won. In light of Congress's specific appropriations language directing us to retain our minority ownership policies,[1] and our long-standing practice of presuming the constitutionality of policies mandated by Congress,[2] I would have expected the decision not to appeal to be by an automatic, 3-0 vote.

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[1] Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

[2] *See, e.g., Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. Section 1464*, 4 FCC Rcd 457 (1988).